

# THE WORLD HEALTH ORGANIZATION’S FRAMEWORK CONVENTION ON TOBACCO CONTROL: AN ANALYSIS OF GUIDELINES ADOPTED BY THE CONFERENCE OF THE PARTIES

*Sam Foster Halabi\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	123
II.	A BRIEF HISTORY OF THE FCTC.....	128
III.	INTERPRETING THE FCTC.....	133
	<i>A. Article 5: General Obligations (Tobacco Industry</i>	
	<i>Interference)</i> .....	137
	<i>B. Article 8: Protection from Exposure to Tobacco Smoke</i> .....	140
	1. <i>International Human Rights Law</i> .....	147
	2. <i>National Constitutions</i> .....	151
	<i>C. Article 11: Packaging and Labeling of Tobacco Products</i> .....	153
	<i>D. Article 13: Advertising, Promotion, and Sponsorship</i> .....	158
IV.	THE DEBATE ON COP DECISION-MAKING UNDER	
	INTERNATIONAL LAW .....	163
	<i>A. Alternatives to Article 31(3)(a)</i> .....	164
	1. <i>Customary International Law</i> .....	165
	2. <i>Soft Law</i> .....	168
	3. <i>The Bangalore Principles</i> .....	170

---

\* Assistant Professor, University of Tulsa College of Law. J.D., Harvard Law School, 2005; M.Phil., Oxford University, 2001; B.A., B.S., Kansas State University, 1999. I would like to express gratitude for the generous support of the O’Neill Institute for National and Global Health Law, as well as for helpful comments from Oscar Cabrera, Larry Gostin, and Edith Brown Weiss. I also would like to thank Oishika Gupta for her excellent research assistance. The O’Neill Institute for National and Global Health Law is in part supported in its tobacco-related research by a grant from the Campaign for Tobacco-Free Kids as part of the Bloomberg Initiative to Reduce Tobacco Use. The views expressed herein are my own and do not necessarily reflect the views of the O’Neill Institute for National and Global Health Law, the Campaign for Tobacco-Free Kids, or the Bloomberg Initiative to Reduce Tobacco Use.

B. *The Wiersema Axes* .....173

    1. *Axis 1: Voting and Level of Consent*.....174

    2. *Axis 2: Level of Authorization by the Treaty* .....174

    3. *Axis 3: Intent*.....175

    4. *Axis 4: Effect in Implementation*.....175

    5. *The Significance of COP Votes*.....176

V. A QUESTION OF GOOD FAITH .....178

VI. CONCLUSION .....183

## I. INTRODUCTION

When he signed the Family Smoking Prevention and Tobacco Control Act on June 22, 2009, U.S. President Barack Obama not only expanded regulatory oversight over the domestic American tobacco industry, but he also emphasized that tobacco consumption was a global epidemic that, left unchecked, would kill one billion people in this century.<sup>1</sup> He promised that the “United States will continue to work with the World Health Organization and other nations to fight this [tobacco] epidemic . . . .”<sup>2</sup> He did not specifically mention the World Health Organization’s Framework Convention on Tobacco Control (FCTC or Convention), which the U.S. signed in 2004 but has not yet ratified.<sup>3</sup> The signing of the bill renewed speculation about the possibility of American accession to the treaty.<sup>4</sup> For much of the rest of the world, the FCTC has served as the primary reference point by which to judge effective tobacco control policies. This Article explores the legal ramifications for countries that have acceded to or ratified the FCTC, especially with respect to guidelines issued by the FCTC’s governing body, the Conference of the Parties (COP). The principal aim is to clarify the legal effect of the guidelines adopted by the COP both for countries that have ratified or acceded to the treaty, and for countries, like the United States, considering accession.<sup>5</sup>

---

<sup>1</sup> Barack H. Obama, President of the United States, Remarks on Signing of the Family Smoking Prevention and Tobacco Control Act (June 22, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Parties to the WHO Framework Convention on Tobacco Control*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC), [http://www.who.int/fctc/signatories\\_parties/en/](http://www.who.int/fctc/signatories_parties/en/) (last visited Nov. 20, 2010).

<sup>4</sup> Scott J. Leischow, *Setting the National Tobacco Control Agenda*, 310 JAMA 1058, 1058–60 (2009).

<sup>5</sup> “Accession” is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states agreed or subsequently agree on it in the case of the state in question. Vienna Convention on the Law of Treaties arts. 2(1)(b), 15, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

“Ratification” defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. *Id.* arts. 2(1)(b), 14, 16.

The World Health Organization (WHO)'s Framework Convention on Tobacco Control is the world's first public health treaty, as well as the first treaty negotiated under the auspices of WHO's Article 19 treaty-making power.<sup>6</sup> The first international agreement establishing evidence-based provisions for curbing global tobacco consumption, the FCTC was adopted by Member States in 2003 and entered into force on February 27, 2005.<sup>7</sup> One hundred seventy-three parties have ratified or acceded to the FCTC as of May 13, 2011.<sup>8</sup>

Like the U.N. Framework Convention on Climate Change, the FCTC was designed as a compromise solution between a purely recommendatory instrument and a binding convention, so as to engage countries in an "incremental and flexible normative exercise" in a novel area:

Member Nations first adopt a framework convention that calls for international cooperation in realizing broadly stated goals, and, ideally, parties to the convention will conclude separate protocols containing specific measures designed to implement those goals. Multilateral environmental organizations have used this model to foster international agreement on pollution control measures and to overcome the resistance of powerful commercial interests.<sup>9</sup>

This has been the underlying approach of the FCTC; the Convention has been followed by additional action to enhance and clarify the strength and scope of the treaty.

The COP is the governing body of the FCTC and is comprised of all Parties to the Convention.<sup>10</sup> In accordance with Article 23(5) of the FCTC,

---

"Signature subject to Ratification, Acceptance or Approval" defines the act where the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. *Id.* arts. 10, 18.

<sup>6</sup> *Foreword to WHO Framework Convention on Tobacco Control*, at v, May 21, 2003–June 29, 2004, WHA56.1, 2302 U.N.T.S. 166, 42 I.L.M. 518, available at [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf).

<sup>7</sup> *Id.* at vi.

<sup>8</sup> *Status of the Convention*, NEWSLETTER (Framework Convention on Tobacco Control), May 2011, at 1, available at [http://www.who.int/fctc/publications/convnews\\_issue9.pdf](http://www.who.int/fctc/publications/convnews_issue9.pdf)

<sup>9</sup> Emily Lee, *The World Health Organization's Global Strategy on Diet, Physical Activity and Health: Turning Strategy into Action*, 60 FOOD & DRUG L.J. 569, 591 (2005).

<sup>10</sup> "The COP may establish such subsidiary bodies as are necessary to achieve the objective of the Convention." *Parties to the WHO Framework Convention on Tobacco Control*, *supra* note 3. One example is the Intergovernmental Negotiating Body for the elaboration of a Protocol on Illicit Trade in Tobacco Products, the first potential Protocol to the WHO FCTC.

the COP regularly reviews implementation of the Convention and makes decisions necessary to promote effective implementation and adopt protocols, annexes, and amendments to the Convention.<sup>11</sup> Article 5.4 of the FCTC outlines a general requirement that Parties cooperate with respect to the formation of procedures and guidelines, while Article 7 of the FCTC specifically requires the COP to issue guidelines as to non-price measures for reducing tobacco consumption contained in Articles 8 through 13.<sup>12</sup> The COP has adopted guidelines for implementation of four Articles: Article 5.3 (Protection of tobacco control policies from commercial and other vested interests of the tobacco industry); Article 8 (Protection from exposure to tobacco smoke); Article 11 (Packaging and labeling of tobacco products); and Article 13 (Tobacco advertising, promotion and sponsorship).<sup>13</sup> The guidelines for Article 8 were adopted at its second session in 2007; guidelines for Articles 5.3, 11, and 13 were adopted at its third session in 2008.<sup>14</sup>

The status of these guidelines as binding treaty law or customary international law is unclear due in part to competing interpretations of the treaty and guidelines language and in part to the weight given to the opinions of certain affiliated treaty bodies.<sup>15</sup> The WHO's Convention Secretariat has called the guidelines "a non-binding instrument adopted by an international body to provide assistance to countries in addressing specific issues at the national or international level."<sup>16</sup> In general, treaty secretariats perform limited technical and ministerial functions; it would be beyond the traditional

---

"The COP also established several working groups with the mandate to elaborate guidelines and recommendations for the implementation of the different treaty provisions." *Id.*

<sup>11</sup> WHO Framework Convention on Tobacco Control, art. 23(5), May 21, 2003–June 29, 2004, WHA56.1, 2302 U.N.T.S. 166, 42 I.L.M. 518 [hereinafter FCTC], available at [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf).

<sup>12</sup> *Id.* arts. 5.4, 7.

<sup>13</sup> FCTC, *Guidelines for Implementation: Article 5.3; Article 8; Article 11; Article 13*, at iii (2009) [hereinafter *Guidelines for Implementation: Arts. 5.3, 8, 11, 13*], available at [http://whqlibdoc.who.int/publications/2009/9789241598224\\_eng.pdf](http://whqlibdoc.who.int/publications/2009/9789241598224_eng.pdf). At COP4, which took place November 15–20, 2010, in Uruguay, the Parties adopted partial guidelines for Articles 9 and 10 (Regulation and Disclosure) and complete guidelines for Article 12 (Public Education) and Article 14 (Cessation). FCTC, *Conference of the Parties to the WHO Framework Convention on Tobacco Control: Provisional Agenda*, available at [http://www.coppt.pt/attachments/12\\_2\\_FCTC\\_COP4\\_1-en.pdf](http://www.coppt.pt/attachments/12_2_FCTC_COP4_1-en.pdf). At the time of writing, these guidelines were not finalized, but the analysis included herein will be generally applicable.

<sup>14</sup> *Guidelines for Implementation: Arts. 5.3, 8, 11, 13*, *supra* note 13.

<sup>15</sup> R. Hammond & M. Assunta, *The Framework Convention on Tobacco Control: Promising Start, Uncertain Future*, 12 TOBACCO CONTROL 241, 241 (2003).

<sup>16</sup> World Health Organization Secretariat, *Additional Matters Identified in the Convention for Consideration by the Conference of the Parties*, art. 5, A/FCTC/COP/1/INF.DOC./3 (Jan. 5, 2006) [hereinafter WHO Secretariat], available at [http://apps.who.int/gb/fctc/PDF/cop1/FC TC\\_COPI\\_ID3-en.pdf](http://apps.who.int/gb/fctc/PDF/cop1/FC TC_COPI_ID3-en.pdf).

scope of the FCTC Secretariat's authority to opine as to the guidelines' "non-binding" nature.<sup>17</sup> Philip Morris International describes the guidelines as "non-binding recommendations to the Parties supplementing specific Articles of the Treaty."<sup>18</sup> The Framework Convention Alliance—the umbrella organization for civil society groups created to support the development, ratification, accession, implementation, and monitoring of the FCTC—calls the guidelines "principles and recommendations to assist Parties in best practice implementation of their treaty obligations."<sup>19</sup> A plain reading of the guidelines' language, as well as interpretive guidance from the Vienna Convention on the Law of Treaties and customary international norms, supports the conclusion that the binding nature of the guidelines is stronger than any of these constituencies' statements suggest.<sup>20</sup> As the WHO Legal Counsel has stated in the context of a protocol on illicit trade in tobacco products, "Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty,' as stated in Article 31 of the Vienna Convention."<sup>21</sup> Indeed, the language of Article 7 mandates not only that the COP adopt guidelines for non-price measures, but that Parties adopt "effective legislative, executive and administrative or other measures" necessary to implement the non-price measures found in Articles 8 through 13.<sup>22</sup> The guidance issued by the COP would appear to be instrumental in fulfilling the FCTC-imposed obligation to adopt "effective . . . measures."<sup>23</sup>

This Article assesses the status of the guidelines issued pursuant to the FCTC as (1) "hard" international law whether treaty or custom-derived; and (2) "soft" international law that has motivated a range of non-state actors to demand domestic administrative, judicial, and legislative action that might in

---

<sup>17</sup> See Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 *ECOLOGY L.Q.* 615, n.231 (2009) ("[T]reaty secretariats and other subsidiary and technical support bodies [ ] typically perform limited secretarial, technical, and ministerial functions . . .").

<sup>18</sup> PHILIP MORRIS INTERNATIONAL, 2009 ANNUAL REPORT 27 (2009), available at [http://media.corporate-ir.net/media\\_files/irol/14/146476/2009\\_Annual\\_Report.pdf](http://media.corporate-ir.net/media_files/irol/14/146476/2009_Annual_Report.pdf).

<sup>19</sup> FRAMEWORK CONVENTION ALLIANCE, HOLD YOUR GOVERNMENT ACCOUNTABLE: USING THE GUIDELINES FOR FCTC IMPLEMENTATION 3, available at [http://fctc.org/dmdocuments/FCA\\_guidelines\\_booklet.pdf](http://fctc.org/dmdocuments/FCA_guidelines_booklet.pdf).

<sup>20</sup> WHO Secretariat, *supra* note 16, arts. 5–6.

<sup>21</sup> FCTC: WHO Framework Convention on Tobacco Control, Revised Chairperson's Text on a Protocol on Illicit Trade in Tobacco Products, and General Debate, at 5, FCTC/COP/INB-IT/3/INF.DOC./6 (May 18, 2009) [hereinafter FCTC Revised Chairperson's Protocol], available at [http://apps.who.int/gb/fctc/PDF/it3/FCTC\\_INB\\_IT3\\_ID6-en.pdf](http://apps.who.int/gb/fctc/PDF/it3/FCTC_INB_IT3_ID6-en.pdf).

<sup>22</sup> WHO Secretariat, *supra* note 16, para. 4.

<sup>23</sup> *Id.*

fact exceed the technical requirements of the treaty.<sup>24</sup> The Article ultimately concludes that Parties are under an obligation to implement treaty provisions in light of the guidelines. While the guidelines' language includes some recommendations that, under their ordinary meaning, would not give rise to mandatory action, they nevertheless have force as soft international law. Indeed, the preliminary evidence shows that the Article 5.3 guidelines—specifically Guiding Principle 1—have exerted an influence far beyond what the recommendatory and highly qualified text of the guidelines demands.

Moreover, other guidelines do impose obligatory action with respect to treaty provisions. For example, with respect to the Article 8 guidelines requiring that Member States protect their populations from exposure to tobacco smoke, the guidelines impose a binding obligation where it is established that citizens hold, *inter alia*, the right to life or the right to the highest attainable standard of health under national law.<sup>25</sup> Grounded in “fundamental human rights and freedoms,” the Article 8 guidelines require States to include “key elements of legislation necessary to effectively protect people from exposure to tobacco smoke” which constitute a binding obligation under the FCTC.<sup>26</sup>

In addition, where ambiguities exist in the treaty language, the guidelines can serve as an interpretive source for national governments seeking to fulfill their obligations under the FCTC. This conclusion does not diminish the enforceability of the guidelines where national governments, including courts, give them the force of domestic law, nor does it foreclose the possibility that certain guidelines may become customary international law, depending on the evolving practice of national governments and their stated reasons for complying with the guidelines. There is quickly taking root a norm requiring that States protect their populations from exposure to tobacco

---

<sup>24</sup> The pronouncements of “highly qualified publicists” provide a fourth source of international law.

<sup>25</sup> The duty to protect from tobacco smoke, embodied in the text of Article 8, is grounded in fundamental human rights and freedoms. Given the dangers of breathing second-hand tobacco smoke, the duty to protect from tobacco smoke is implicit in, *inter alia*, the right to life and the right to the highest attainable standard of health, as recognized in many international legal instruments . . . as formally incorporated into the preamble of the WHO Framework Convention and as recognized in the constitutions of many nations.

World Health Organization [WHO], *Guidelines on Protection from Exposure to Tobacco Smoke*, para. 4(a) (2007) [hereinafter *WHO Guidelines*], available at [http://www.who.int/fctc/cop/art%208%20guidelines\\_english.pdf](http://www.who.int/fctc/cop/art%208%20guidelines_english.pdf). While the legal grounding for the obligation would originate primarily with national legal sources rather than the FCTC, the treaty would add to that obligation. Indeed, as international legal instruments like the FCTC proliferate, they will increasingly inform longer-standing but less defined rights like the right to the highest attainable standard of physical and mental health.

<sup>26</sup> *Id.* para. 3.

smoke that, with some speed, may become a fundamental component of the right to life and the right to health. Within the nascent but growing literature on consensus-based decisions of treaty governing bodies, this thesis implicitly argues that the prevailing theoretical approach—which aims to identify and separate “hard” international law, based on treaty and custom, from “soft” international law, based on standards and norms—remains useful for understanding COP decisions as a source of international law.<sup>27</sup> Part II of this Article provides a brief history of the FCTC. Part III will analyze the status of the guidelines using the Vienna Convention on the Law of Treaties as the primary source for rules of treaty construction as well as analyze the status of the FCTC guidelines under customary international law. Part IV will discuss soft law aspects of the guidelines, including their role as interpretative tools used in domestic courts. Part V will situate the experience of the FCTC within the broader literature on COP decision-making.

## II. A BRIEF HISTORY OF THE FCTC

During a meeting of public health scholars in 1993, Professor Ruth Roemer suggested that the WHO finally make use of its long dormant treaty-making power to address the public health threat posed by tobacco consumption.<sup>28</sup> In 1994, delegates to the 9th World Conference on Tobacco and Health adopted a resolution Roemer introduced, urging the creation of an international instrument for tobacco control.<sup>29</sup> Canada, Finland, Mexico, and Tanzania supported the idea at the World Health Assembly (WHA), which adopted Resolution 48.11, advocating the use of an “international instrument” to curb global tobacco consumption.<sup>30</sup>

In 1995, Roemer and Allyn Taylor, who developed the idea for a framework convention on tobacco control as part of her doctoral thesis at Columbia, collaborated to develop a background paper outlining various

---

<sup>27</sup> See Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L L. 231, 233 (2009) (arguing that understanding consensus-based COP decisions as either “hard” law or “soft” law is inadequate and that COP decisions should be analyzed with reference to underlying treaty obligations).

<sup>28</sup> Ruth Roemer et al., *Origins of the WHO Framework Convention on Tobacco Control*, 95:6 AM. J. PUB. HEALTH 936, 936–38 (2005), available at <http://ajph.aphapublications.org/cgi/reprint/95/6/936>.

<sup>29</sup> WHO Director General, *The Feasibility of Developing an International Instrument for Tobacco Control*, EM97/INF.Doc./4 (Nov. 30, 1995).

<sup>30</sup> World Health Assembly, *An International Strategy for Tobacco Control*, EB95.R9, WHA48.11, WHO/PSA/96.6 (May 12, 1995), available at [http://www.who.int/tobacco/framework/wha\\_eb/wha48\\_11/en](http://www.who.int/tobacco/framework/wha_eb/wha48_11/en); Roemer et al., *supra* note 28, at 937. “Despite some objections, a text was adopted by the executive board (EB95.R9) and later by the WHA (WHA48.11).” *Id.*



options for international action on tobacco control to be undertaken by the United Nations (UN) in accordance with WHA Resolution 48.11.<sup>31</sup> A detailed outline of the proposed document was delivered to the WHO on July 27, 1995, setting forth options for an international legal strategy for tobacco control and recommending the development and implementation of a WHO framework convention on tobacco control and related protocols to promote global cooperation and national action.<sup>32</sup>

In 1996, the WHO Director General issued a brief report entitled "The Feasibility of an International Instrument for Tobacco Control," summarizing the key recommendations of the manuscript.<sup>33</sup> Despite opposition from the WHO Secretariat, the Executive Board adopted the resolution, "An International Framework Convention for Tobacco Control," due in significant part to the persistence of Jean Lariviere, a Senior Medical Adviser at Health Canada, and because of the support given by the governments of Finland and Ireland.<sup>34</sup> In May 1996, the WHA adopted the resolution for the development of a WHO framework convention on tobacco control and related protocols (WHA49.16).<sup>35</sup>

Heavy political opposition from Member States stalled progress on the resolution until 1998, when Gro Harlem Brundtland was elected as WHO's Director General.<sup>36</sup> Litigation in the United States revealed the extent of tobacco manufacturers' collusive efforts to hide smoking-related health risks, and key resolutions issued by the American Public Health Association in 1998 and 2001 generated substantial political momentum for an effective

---

<sup>31</sup> Taylor developed the idea for an "international regulatory strategy for tobacco control" and specifically a framework convention protocol as part of her doctoral dissertation at Columbia University. Allyn Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L L. 257, 283-302 (1996).

<sup>32</sup> Roemer et al., *supra* note 28, at 937. The recommended treaty faced severe resistance and opposition from various sectors including from within the WHO. A senior WHO official criticized the Taylor-Roemer proposal as "ambitious to a fault," emphasized that "it is important to be realistic," and encouraged "revising the outline and preparing the background paper." For some WHO officials, it was not acceptable that the treaty be formed under the auspices of the WHO and they were reluctant to make use of their constitutional authority to develop a treaty on any matter affecting global public health. It was suggested that Roemer and Taylor think on the lines of developing a WHO code of conduct on tobacco control akin to the WHO International Code of Marketing Breast-Milk Substitutes, a nonbinding international instrument that might be adopted by WHA as a resolution, or a treaty to be adopted under the auspices of the United Nations. However, Taylor and Roemer remained persuaded as to their original idea and submitted a final manuscript which proposed the development of a WHO framework convention on tobacco control and related protocols and recommended substantive and procedural mechanisms that could be included in the proposed convention to make it an effective instrument of international health policy. *Id.*

<sup>33</sup> WHO Director General, *supra* note 29.

<sup>34</sup> See Roemer et al., *supra* note 28 (identifying the supporting governments).

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 938 (remarking on the importance of Brundtland's succession).

WHO framework convention on tobacco control as part of a growing worldwide public health movement.<sup>37</sup>

In 1999, Member States adopted resolution WHA52.18, which established both a WHO FCTC Working Group to draft core treaty elements and an Intergovernmental Negotiating Body to develop the treaty text.<sup>38</sup> Toward the latter part of 2000, the WHO conducted public hearings, which garnered over 500 submissions from public health agencies, women's groups, community-based organizations, academic institutions, the major tobacco multinationals, state tobacco companies, and tobacco farming groups.<sup>39</sup>

Many of these submissions reflected the substantial economic interests at stake in developing a global regime committed to reducing tobacco consumption.<sup>40</sup> The tobacco industry advocated what Brundtland referred to as "support for policies and measures that are known to have a very limited impact on youth and adult consumption of tobacco."<sup>41</sup> This meant, in effect,

<sup>37</sup> See *An International Tobacco Control Policy: Policy Number 9809*, AMER. PUBLIC HEALTH ASS'N (Jan. 1, 1998), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=161> (stating recommendations for the U.S. policy on tobacco); see also *Tobacco Trust Fund for Developing Countries to Meet National Commitment Under the WHO Framework Convention for Tobacco Control: Policy Number 200124*, AMER. PUBLIC HEALTH ASS'N (Jan. 1, 2001), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=263> (emphasizing the importance of the FCTC); Richard D. Hurt, *Open doorway to truth: Legacy of the Minnesota Tobacco Trial*, 84:5 MAYO CLINIC PROC. 446, 446-56 (2009), available at <http://www.mayoclinicproceedings.com/content/84/5/446.full.pdf+html> (discussing the "Minnesota Tobacco Trial" and the Master Settlement Agreement between 46 U.S. state attorneys general and the U.S. tobacco industry). For a theoretical framework that accommodates the case of the FCTC as an international regulatory response to a policy crisis, see *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., 2009) (discussing how and why "regulatory capture" happens, and how it can be averted).

<sup>38</sup> *Working Group Preceding the Intergovernmental Negotiating Body on the WHO FCTC (1999-2000)*, FCTC: WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, [http://www.who.int/fctc/about/pre\\_neg\\_working\\_group/en/index.html](http://www.who.int/fctc/about/pre_neg_working_group/en/index.html) (last visited Nov. 20, 2010).

<sup>39</sup> Press Release, Gro Harlem Brundtland, WHO Director-General's Response to the Tobacco Hearings (Oct. 13, 2000) [hereinafter Brundtland], [http://www.who.int/tobacco/framework/public\\_hearings/dghearings\\_en.pdf](http://www.who.int/tobacco/framework/public_hearings/dghearings_en.pdf).

<sup>40</sup> World Health Assembly, *supra* note 30. Philip Morris International (PMI) asserts to its shareholders that certain provisions of the FCTC Guidelines are "extreme application[s]" of the FCTC that are "untethered to public health objectives" and may adversely affect their business and financial position. "[L]imiting tobacco industry involvement in the development of tobacco policy and regulations, generic packaging, point of sale display bans, a ban on the use of colors in packaging, and a ban on all forms of communications to adult smokers." PHILIP MORRIS INTERNATIONAL, *supra* note 18, at 27. See also PHILIP MORRIS INTERNATIONAL, 2008 ANNUAL REPORT 28 (2009), available at [http://media.corporate-ir.net/media\\_files/irol/14/146476/PMAR2009.pdf](http://media.corporate-ir.net/media_files/irol/14/146476/PMAR2009.pdf) (discussing the growing concerns of public health organization with regard to tar and nicotine testing and brand descriptors, and emphasizing Philip Morris International's opposition to any package and descriptive restrictions as unduly restrictive of intellectual property rights, particularly addressing litigation against Uruguay).

<sup>41</sup> Brundtland, *supra* note 39.

manufacturing products with fewer contaminants and carcinogens<sup>42</sup> and developing relatively ineffective alternatives to the FCTC in an explicit attempt to undermine its development.<sup>43</sup> For example, British American Tobacco “launched its so-called ‘corporate social responsibility’ campaign with the aim of moving the tobacco industry ‘ahead—fast enough and far enough—of the WHO agenda to negate the need for the [FCTC].’”<sup>44</sup> Simultaneously, some WHO officials raised concerns about the capability and capacity of WHO as an organization to be able to effectively administer the treaty.<sup>45</sup>

---

<sup>42</sup> *Id.*

<sup>43</sup> Stacy M. Carter et al., *Destroying Tobacco Control Activism From the Inside*, 11 TOBACCO CONTROL 112, 112–18 (2002) (describing a public relations firm’s intelligence-gathering on the FCTC development process and advice given to PMI on action to delay and undermine the FCTC). See also Hadii Mamudu et al., *Project Cerberus: Tobacco Industry Strategy to Create an Alternative to the Framework Convention on Tobacco Control*, 98:9 AM. J. PUB. HEALTH 1630, 1630–42 (2008) (discussing the collaboration between BAT, PM, and JTI to promote a “voluntary global youth smoking prevention” standard “as an alternative to the FCTC”).

<sup>44</sup> CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO INDUSTRY PROFILE – LATIN AMERICA 11 (2009), [http://www.tobaccofreecenter.org/files/pdfs/en/IW\\_facts\\_countries\\_%20LatinAmerica.pdf](http://www.tobaccofreecenter.org/files/pdfs/en/IW_facts_countries_%20LatinAmerica.pdf). Currently, the leading transnational tobacco companies (TTCs) make broad statements of support for the FCTC on their corporate websites, while simultaneously promoting non-FCTC compliant measures such as designated smoking rooms (Article 8) or partial advertising restrictions (Article 13), in addition to openly combating guidelines that threaten existing infrastructure that accommodates financial and political influence (Article 5.3). K.E. Smith et al., *Tobacco Industry Attempts to Undermine Article 5.3 and “Good Governance” Traps*, 18 TOBACCO CONTROL 509 (2009). See generally *Regulation of Public Place Smoking*, PHILIP MORRIS INT’L, [http://www.pmi.com/eng/tobacco\\_regulation/regulating\\_tobacco/pages/public\\_place\\_smoking.aspx](http://www.pmi.com/eng/tobacco_regulation/regulating_tobacco/pages/public_place_smoking.aspx) (last visited Nov. 20, 2010) (“In restaurants, bars, cafes, discos, and other entertainment establishments, proprietors should be free to decide whether to permit, restrict, or prohibit smoking.”). British American Tobacco’s corporate website states:

We believe that governments, employers, the hospitality industry, the tobacco industry, consumers and others can work together on practical initiatives. These include providing separate smoking and non-smoking areas and ventilation to reduce involuntary exposure to second-hand smoke. Air filtration systems can also make a room more comfortable, although they too cannot completely remove the smoke.

*Public Place Smoking: Practical Initiatives*, BRIT. AMER. TOBACCO, [http://www.bat.com/group/sites/UK\\_3MNFEN.nsf/vwPagesWebLive/DO6HADSB?opendocument&SKN=1](http://www.bat.com/group/sites/UK_3MNFEN.nsf/vwPagesWebLive/DO6HADSB?opendocument&SKN=1) (last updated July 5, 2010). See also *Banning the Display of Tobacco Products*, PHILIP MORRIS INT’L MGMT. S.A. (PMIMSA), <http://www.productdisplayban.com/> (last updated Aug. 13, 2010) (“A small number of countries have banned the display of tobacco products at the point of sale, arguing this is a necessary step to prevent people, particularly youth, from smoking.”).

<sup>45</sup> Roemer et al., *supra* note 28, at 937 (“Further, there was particular resistance to their proposal that such a treaty be developed under the auspices of WHO, an organization that had never in its almost 50-year history utilized its constitutional authority to develop a treaty on any matter affecting global public health. In a letter to Roemer dated July 28, 1995, a senior WHO official criticized the Taylor–Roemer proposal as “ambitious to a fault,” emphasized that “it is important to be realistic,” and encouraged “revising the outline and preparing the

Brundtland outlined four interventions for which the evidence showed effective reduction in the harms caused by tobacco products and advocated a treaty based on those interventions: (1) prevent youth and non-smokers from picking up the habit of smoking; (2) encourage smokers to quit; (3) prevent non-smokers from being exposed to secondhand smoke; and (4) reduce the levels of harmful constituents in tobacco products.<sup>46</sup> These interventions, as well as price-based policies, provided the backdrop to formal negotiations opened during the first session of the Intergovernmental Negotiating Body comprised of all WHO Member States, regional economic integration organizations, and observers. The negotiations began on October 16, 2000 and continued through May 21, 2003, when the World Health Assembly unanimously adopted the final text.<sup>47</sup> With Turkmenistan's accession on May 13, 2011, the FCTC reached a total of 173 Parties—over 84% of eligible Parties—accounting for over 86% of the world's population.<sup>48</sup>

Like many multilateral treaties, the primary mechanism for monitoring the conduct of States Parties to the FCTC is a system of periodic national reporting. The treaty sets forth general guidelines for the content of reports, which must address measures taken at the national level to implement the FCTC, constraints or barriers encountered in the course of implementation, measures taken to overcome such constraints or barriers, and information on financial and technical assistance provided or received for tobacco control activities.<sup>49</sup> States Parties are also required to provide certain types of information gathered in the course of their implementation efforts.<sup>50</sup> The level of States' compliance with their treaty obligations varies based on their perceived national interests.<sup>51</sup> "National reporting systems are intended to

---

background paper.”). Brundtland, *supra* note 39, at 2–3 (detailing the differing positions of WHO, the Member States, and tobacco companies and the challenges they present for WHO).

<sup>46</sup> Brundtland, *supra* note 39, at 2.

<sup>47</sup> *An International Treaty for Tobacco Control*, WORLD HEALTH ORG. (Aug. 12, 2003), [http://www.who.int/features/2003/08/en; Annex 2: History of the WHO FCTC Process, FRAMEWORK CONVENTION ALLIANCE, http://www.fctc.org/index.php?option=com\\_content&view=article&id=179&Itemid=179](http://www.who.int/features/2003/08/en; Annex 2: History of the WHO FCTC Process, FRAMEWORK CONVENTION ALLIANCE, http://www.fctc.org/index.php?option=com_content&view=article&id=179&Itemid=179) (last visited Nov. 20, 2010) (specifying the beginning of the negotiations as October 16, 2000).

<sup>48</sup> WHO, *UPDATED STATUS OF THE WHO FCTC: RATIFICATION AND ACCESSION BY COUNTRY 2* (2009), available at [http://www.fctc.org/dmdocuments/ratification\\_latest\\_Bahamas.pdf](http://www.fctc.org/dmdocuments/ratification_latest_Bahamas.pdf); *Status of the Convention*, *supra* note 8.

<sup>49</sup> FCTC, *supra* note 11, art. 21(1)(a)–(c).

<sup>50</sup> *Id.* In practice, the monitoring and evaluation obligations of the treaty have been coordinated and overseen jointly by the Framework Convention Alliance and the Institute for Global Tobacco Control at Johns Hopkins Bloomberg of Public Health which issues an annual report based on the information described above. *FCTC Monitoring*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH, [http://www.jhsph.edu/global\\_tobacco/surveillance\\_evaluation/fctc\\_monitoring/](http://www.jhsph.edu/global_tobacco/surveillance_evaluation/fctc_monitoring/) (last visited Nov. 20, 2010).

<sup>51</sup> See Asif Efrat, *A Theory of Internationally Regulated Goods*, 32 *FORDHAM INT'L L.J.* 1466, 1467, 1495–1504 (2009) (arguing that governments which support international trade

subject governments to public scrutiny with the goal of assisting them in implementing their international obligations and, where necessary, generating moral pressure to comply with applicable norms.”<sup>52</sup>

### III. INTERPRETING THE FCTC

Article 38 of the Statute of the International Court of Justice recognizes the following sources of international law: “international conventions, whether general or particular, establishing rules expressly recognized by contesting States”; “international custom, as evidence of a general practice accepted as law”; “the general principles of law recognized by civilized nations”; and judicial decisions and teachings of highly qualified publicists.<sup>53</sup> As an international convention, the FCTC is subject to customary rules of treaty interpretation as established under the Vienna Convention on the Law of Treaties (Vienna Convention);<sup>54</sup> Article 31 of the Vienna Convention provides that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

---

regulation are motivated either by “the trade’s negative externalities upon their own countries (primary externalities)... [or] on foreign countries (secondary externalities)”); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 25–26 (1979) (finding that international law “always yield to national interest”); *see also* Mary Assunta & Simon Chapman, *Health Treaty Dilution: A Case Study of Japan’s Influence on the Language of the WHO Framework Convention on Tobacco Control*, 60 J. EPIDEMIOLOGY & COMMUNITY HEALTH 751, 751–55 (2006) (arguing that the Japanese government’s stake in the tobacco industry caused it to successfully argue for optional language in the FCTC).

<sup>52</sup> Melissa E. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control*, 29 YALE J. INT’L L. 209, 219 (2004) (citation omitted).

<sup>53</sup> Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, 3 Bevans 1179.

<sup>54</sup> FCTC Revised Chairperson’s Protocol, *supra* note 21, at 3.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.<sup>55</sup>

The FCTC is comprised of thirty-eight articles that outline the governing structure and substantive requirements of an evidence-based approach to reduce the harms of tobacco consumption.<sup>56</sup> Articles 6 through 17 outline approaches to reduce both supply of and demand for tobacco.<sup>57</sup> Article 23 of the FCTC establishes the COP, which conducts regular sessions not only to review progress in treaty implementation, but also to make decisions that facilitate effective implementation.<sup>58</sup> The decisions of the COP are reached by consensus; amendments and protocols can be adopted with a three-quarters majority of present voting Parties if consensus cannot be reached.<sup>59</sup>

---

<sup>55</sup> Vienna Convention, *supra* note 5, at pt. II, § 3, art. 31(1)–(3). Although many countries, including the United States, have not signed the Vienna Convention, its provisions are widely regarded as constituting customary international law. See Restatement (Third) of Foreign Relations Law of the United States § 325 cmt. a (1987) (“[The Vienna Convention] represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis.”). But see Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 433–44, 449 (2004) (noting that the United States Supreme Court has never applied the Vienna Convention as binding U.S. law).

<sup>56</sup> FCTC, *supra* note 11.

<sup>57</sup> *Id.* arts. 6–17.

<sup>58</sup> *Id.* art. 23. See generally Roda Verheyen, *The Climate Change Regime after Montreal: Article 2 of the UN Framework Convention on Climate Change Revisited*, 7 Y.B. EUR. ENVTL. L. 234 (2007) (discussing the relevance of COP decision-making in the context of the U.N. Framework Convention on Climate Change); Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT’L L. 421 (2008) (discussing the relevance of COP decision-making in the context of the WTO).

<sup>59</sup> FCTC, *supra* note 11, art. 28.

Authority for the COP to issue guidelines is found in both Article 5.4, which outlines a general requirement that Parties cooperate with respect to the formation of procedures and guidelines, and Article 7, which specifically requires the COP to issue guidelines as to non-price measures for reducing tobacco consumption.<sup>60</sup> The COP adopted guidelines for Articles 5.3, 8, 11, and 13 unanimously.<sup>61</sup> Thus, there is little question that they constitute a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” under the Vienna Convention.<sup>62</sup> As the WHO Legal Counsel concluded with respect to the inclusion of key inputs and manufacturing equipment as relevant for combating illicit trade, “[d]ecisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a ‘subsequent agreement between the Parties regarding the interpretation of the treaty’, as stated in Article 31 of the Vienna Convention.”<sup>63</sup> Parties must therefore interpret treaty provisions in light of the guidelines as part of their good-faith obligation regarding treaty compliance.

Together with context, the guidelines are appropriately used to ascertain the meaning of treaty terms, although they must be given an ordinary reading. The ordinary meaning of the majority of the guidelines’ language suggests that they are not intended to have binding legal effect as

---

<sup>60</sup> *Id.* art. 7.

<sup>61</sup> WHO, WHO’S FRAMEWORK CONVENTION ON TOBACCO CONTROL . . . SAVING LIVES 1 (2010), available at <http://www.emro.who.int/tfi/wntd2011/pdf/1%20WNTD%202011%20FCTC%20ENGLISH.pdf> (“Five guidelines have been unanimously adopted for Articles 5.3, 8, 11, 12, 13 and 14; partial guidelines for Articles 9 and 10 have also been adopted.”).

<sup>62</sup> Whether consensus documents made pursuant to an international treaty achieve status as a “subsequent agreement” under Vienna Convention 31(3) vary widely depending on the nature of the treaty and its organizational structure. See Burrus M. Carnahan, *Treaty Review Conferences*, 81 AM. J. INT’L L. 226, 229 (1987) (discussing that a final declaration of a treaty review conference would likely fit the Vienna Convention’s definition of subsequent agreement or subsequent practice); Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on other Actors and Regimes*, 24 BERKELEY J. INT’L L. 79, 125 (2006) (stating that under Vienna Convention Article 30, should a later protocol contradict a previously signed treaty, the treaty should control); Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT’L L. 405, 485 (2003) (noting that consensus documents from Non-Proliferation Treaty Review Conferences “constitute ‘subsequent agreement’ and/or ‘subsequent practice’ by parties,” and so fall under article 31(3) of the Vienna Convention as considered binding on the treaty signatories). But see Christopher A. Ford, U.S. Special Rep. for Nuclear Nonproliferation, *NPT on Trial: How Should We Respond to the Challenges of Maintaining and Strengthening the Treaty Regime?*, Remarks to the Ministry of Foreign Affairs of Japan and the Center for the Promotion of Disarmament and Nonproliferation (Feb. 6, 2007), <http://www.mtholyoke.edu/acad/intrel/Iran/trial.htm> (stating that political consensus documents “do not themselves have any legal import” and would not fall under Vienna Convention Article 31(3)).

<sup>63</sup> FCTC Revised Chairperson’s Protocol, *supra* note 21, at 5.

international law.<sup>64</sup> While the guidelines as to each FCTC Article are not of uniform length and contain important differences (Article 8 is the shortest, while Article 13 is the most extensive), some language applicable to all guidelines either implies or states explicitly that they are “principles and recommendations to assist Parties in best practice implementation of their treaty obligations,” as opposed to binding obligations.<sup>65</sup>

The purpose, scope, and applicability of the guidelines variously declare that States “should,” “should consider,” “should endeavour,” “should ensure,” and “should require” the measures adopted by the COP.<sup>66</sup> The text of the FCTC uses the word “shall” as to certain of Parties’ obligations.<sup>67</sup> The use of the word “should,” in most contexts, is “precatory, not mandatory.”<sup>68</sup> Yet the word “should” may also be used to express a duty or obligation albeit with a degree of flexibility or discretion.<sup>69</sup> FCTC Article 11.1(b)(iv) illustrates this distinction, requiring that warnings and messages “should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas.”<sup>70</sup> Furthermore, many of the measures adopted without objection by the COP are styled “recommendations,” the ordinary meaning of which does not entail mandatory action.<sup>71</sup> In the following sections, the treaty language is juxtaposed with key language from the guidelines in an effort to sort out obligations imposed by the treaty language, obligations clarified by virtue of guidance from the guidelines, and non-obligatory provisions of the guidelines that are precatory or recommendatory.<sup>72</sup>

<sup>64</sup> See FRAMEWORK CONVENTION ALLIANCE, *supra* note 19, at 6 (coupling the language issued by the FCA in its publication, “Hold Your Government Accountable,” with the guidelines to present the “highest attainable standard of health”).

<sup>65</sup> *Id.* at 3.

<sup>66</sup> FCTC, *supra* note 11.

<sup>67</sup> *Id.*

<sup>68</sup> *United States v. Rogers*, 14 Fed. Appx. 303, 305 (6th Cir. 2001). See also Carlos M. Vasquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1339 n.75 (1999) (“[O]ften treaties express broad aspirations in precatory terms.”).

<sup>69</sup> See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1211 (9th Cir. 2005) (en banc) (Hawkins, J., dissenting) (“The word ‘should’ is used ‘to express a duty [or] obligation.’” (citing THE OXFORD AMERICAN DICTION AND LANGUAGE GUIDE 931 (1999))); Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1319 (2005) (noting that treaties are not amenable to using dictionary definitions of terms, especially precatory and mandatory words).

<sup>70</sup> FCTC, *supra* note 11, at 10.

<sup>71</sup> Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT’L L. 623, 643 (2000) (drawing a distinction between “unanimous” and “adopted by consensus”).

<sup>72</sup> Because this Article is intended for both expert and novice audiences, the guidelines will be described with sufficient generality to appropriately fit within the proffered analytical



*A. Article 5: General Obligations (Tobacco Industry Interference)*

World Health Assembly Resolution WHA54.18 on transparency in tobacco control, citing the findings of the Committee of Experts on Tobacco Industry Documents, states that “the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic.”<sup>73</sup>

The literature documenting the tobacco industry’s efforts to limit governments’ measures on tobacco control is vast and growing.<sup>74</sup> The release of tobacco industry documents as a result of litigation in the United States showed that those efforts included, *inter alia*, developing self-regulatory guidelines as alternatives to legislation, presenting false information to regulators known to be false at the time of presentation, secretly funding ostensibly independent scientific authorities, attempting to draft weak legislation, and influencing law makers through direct and indirect lobbying.<sup>75</sup>

---

framework without simply repeating the full text. References for the full text will be provided throughout the footnotes.

<sup>73</sup> WHO, *Transparency in Tobacco Control*, WHA54.18, available at [http://www.who.int/tobacco/framework/wha\\_eb/wha54\\_18/en/index.html](http://www.who.int/tobacco/framework/wha_eb/wha54_18/en/index.html). The scale and intensity of the tobacco industry’s effort to discredit the World Health Organization is an important episode in understanding tobacco industry efforts to influence the public health debate on tobacco consumption. Coordinated tobacco industry efforts to secretly purchase the opinions of international and scientific authorities are well-known, but the industry also, *inter alia*, employed former WHO officials and promised to employ then-current WHO employees; directed philanthropic contributions—funded non-tobacco related WHO efforts—specifically to “penetrate the bureaucratic structure of WHO”; campaigned the World Bank, the U.N. Food and Agricultural Organization, and the International Labour Organization to issue reports hostile to WHO tobacco-related activities; misrepresented tobacco-industry funded scientific conferences as sponsored by the WHO; and, used affiliated food production companies and subsidiaries as “neutral ground” to lobby against activities they viewed as threatening to expansion of tobacco production, manufacturing and consumption. World Health Organization, *Report of the Committee of Experts on Tobacco Industry Documents: Tobacco Companies’ Strategies to Undermine Tobacco Control Activities*, at 38–39 (June 2000), available at [http://www.who.int/tobacco/media/en/who\\_inquiry.pdf](http://www.who.int/tobacco/media/en/who_inquiry.pdf).

<sup>74</sup> Hard copy documents reside in document depositories near Guildford, UK and in Minnesota, U.S.—containing a total of approximately sixty million pages of documents and thousands of audio and video materials, the majority of which are now on-line at the Legacy Tobacco Documents Library located at the University of California at San Francisco. *A Digital Library of Tobacco Documents*, UNIV. CAL., S.F.: LEGACY TOBACCO DOCUMENTS LIBRARY, <http://legacy.library.ucsf.edu/> (last visited Nov. 20, 2010).

<sup>75</sup> M. Assunta & S. Chapman, *A Mire of Highly Subjective and Ineffective Voluntary Guidelines: Tobacco Industry Efforts to Thwart Tobacco Control in Malaysia*, 13 TOBACCO CONTROL 43, 43–50 (2004); WHO: TOBACCO FREE INITIATIVE FOR A TOBACCO FREE FUTURE, TOBACCO INDUSTRY INTERFERENCE WITH TOBACCO CONTROL 10–11, 15 (2008), available at

As part of the strategies advocated for reducing tobacco industry interference in setting public health policy, Article 5.3 of the FCTC requires that, “[i]n setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”<sup>76</sup> The Article 5.3 guidelines outline specific “activities [that] are *recommended* for addressing tobacco industry interference . . . .”<sup>77</sup> These activities include: limiting interactions between tobacco industry and government representatives; ensuring the transparency of any interactions that do occur; avoiding conflicts of interest between government officials and the tobacco industry; refusing to accept voluntary codes of conduct in place of enforceable laws; de-normalizing the tobacco industry or regulating the activities undertaken by the industry as party of “corporate social responsibility”; and, where the State has an ownership interest in a tobacco company, treating it as any other regulated enterprise.<sup>78</sup>

Article 5.3 provides governments substantial flexibility in meeting this obligation as the level of protection required is left to existing processes for establishing national law, e.g., passage of legislation, review and interpretation by national courts, and administrative regulations issued under executive authority.<sup>79</sup> Similarly, the guidelines are conditioned on the discretion afforded national governments in setting tobacco control policy—“Without prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement [guidelines to Articles 5.3] to the extent possible in accordance with their national law.”<sup>80</sup> Moreover, it is the aim of the Article 5.3 guidelines to “assist Parties in meeting their legal obligations under Article 5.3 of the Convention.”<sup>81</sup>

The Article 5.3 guidelines, at least impliedly, represent a high standard for treaty compliance. “While the measures recommended in these guidelines should be applied by Parties as broadly as necessary, *in order best to achieve the objectives of Article 5.3 of the Convention*, Parties are strongly urged to

---

[http://www.who.int/tobacco/resources/publications/Tobacco%20Industry%20Interference-FI NA L.pdf](http://www.who.int/tobacco/resources/publications/Tobacco%20Industry%20Interference-FI%20NA%20L.pdf).

<sup>76</sup> FCTC, *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the Protection of Public Health Policies with Respect to Tobacco Control from Commercial and Other Vested Interests of the Tobacco Industries*, para. 3 (Nov. 22, 2008) [hereinafter *Guidelines for Implementation: Art. 5.3*], available at [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf).

<sup>77</sup> *Id.* para. 17 (emphasis added).

<sup>78</sup> *Id.* para. 17(1)–(8).

<sup>79</sup> *See id.* para. 3 (encouraging protection of policies through national law).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* para. 8.

implement measures beyond those recommended in these guidelines when adapting them to their specific circumstances.”<sup>82</sup>

The guidelines to Article 5.3 conclude with the statement that the COP reserves the right to consider elaborating a protocol—as provided under FCTC Article 33—for Article 5.3.<sup>83</sup> That the COP reserved the right to establish a protocol is itself not evidence of any obligation with respect to Article 5.3. It might mean that the matter is of sufficient urgency to require an additional protocol (as is the case for Article 15 on illicit trade in tobacco products); that Parties could not reach an agreement on an issue located so close to issues of national sovereignty; or that the call for an additional protocol diminishes the weight that should be given to the Article 5.3 guidelines because they are merely recommendatory short of an additional protocol.

The Article 5.3 guidelines also contain language that would ordinarily be understood to express a duty or obligation. This includes language that not only specifically addresses an obligation found within the treaty, e.g., “comprehensive” national tobacco control strategies, but also obligations modified by use of the word “should,” which may be understood to impose an obligation with some discretion afforded to the implementing government:

7. The purpose of these guidelines is to ensure that efforts to protect tobacco control from commercial and other vested interests of the tobacco industry are comprehensive and effective. Parties should implement measures in all branches of government that may have an interest in, or the capacity to, affect public health policies with respect to tobacco control. . . .

9. The guidelines apply to setting and implementing Parties’ public health policies with respect to tobacco control. They also apply to persons, bodies or entities that contribute to, or could contribute to, the formulation, implementation, administration or enforcement of those policies.

10. The guidelines are applicable to government officials, representatives and employees of any national, state, provincial, municipal, local or other public or semi/quasi-public institution or body within the jurisdiction of a Party, and to any person acting on their behalf. Any government branch

---

<sup>82</sup> *Id.* para. 12 (emphasis added).

<sup>83</sup> *See id.* para. 39 (discussing the COP’s consideration of the need to establish a protocol).

(executive, legislative and judiciary) responsible for setting and implementing tobacco control policies and for protecting those policies against tobacco industry interests should be accountable.<sup>84</sup>

Thus, the Article 5.3 guidelines, under the ordinary meaning of the terms, set forth an aspirational standard for compliance with treaty obligations and are explicitly conditioned on the sovereignty of the Parties. Yet Article 5.3 is specified as an area of sufficient priority to warrant a separate protocol concluded under Article 33. Moreover, the language within the guidelines may give rise to some obligations including the organizations and agents of a government to which it is applicable and the standard it sets for measuring a “comprehensive” national tobacco control strategy under FCTC Article 5.<sup>85</sup>

*B. Article 8: Protection from Exposure to Tobacco Smoke*

In June 2006, U.S. Surgeon General Richard Carmona stated, “[T]he debate is over. The science is clear: secondhand smoke is not a mere annoyance, but a serious health hazard that causes premature death and disease in children and nonsmoking adults.”<sup>86</sup> Tobacco smoke contains at least fifty carcinogens and is a proven cause of lung cancer, heart disease, respiratory illnesses such as bronchitis and asthma, low birth weight, and sudden infant death syndrome.<sup>87</sup> A 2009 report released by the U.S. Institute of Medicine reviewing eleven studies from the U.S., Canada, and Scotland on the relationship between smoke-free laws and cardiovascular disease concluded that secondhand smoke causes heart attacks while smoke-free laws prevent them.<sup>88</sup>

---

<sup>84</sup> *Id.* paras. 7, 9–10.

<sup>85</sup> Notwithstanding the establishment of a binding legal obligation, the “enforceability” of a treaty is dependent upon the domestic legal systems and which actors are empowered to bring a claim based on a treaty. Moreover, States can, and do, ignore obligations imposed under international law.

<sup>86</sup> Richard H. Carmona, U.S. Surgeon Gen., *The Health Effects of Secondhand Smoke*, Remarks at Press Conference to Launch Health Consequences of Involuntary Exposure to Tobacco Smoke (June 27, 2006), available at <http://www.surgeongeneral.gov/news/speeches/06272006a.html>.

<sup>87</sup> *Id.*

<sup>88</sup> INST. MED. NAT'L ACAD.: COMM. ON SECONDHAND SMOKE EXPOSURE & ACUTE CORONARY EVENTS, SECONDHAND SMOKE EXPOSURE AND CARDIOVASCULAR EFFECTS: MAKING SENSE OF THE EVIDENCE 18–21 (2010). See also J.E. Callinan et al., *Legislative Smoking Bans for Reducing Secondhand Smoke Exposure, Smoking Prevalence and Tobacco Consumption*, 6 COCHRANE DATABASE OF SYSTEMATIC REVIEWS 1, 1–126 (2010) (addressing legislative means for reducing the health effects of secondhand smoke).

The FCTC obligates States Parties to undertake appropriate initiatives to protect present and future generations from the health, social, environmental, and economic consequences of tobacco consumption and exposure to secondhand smoke.<sup>89</sup> Establishing smoke-free public places is the first of the demand-reduction obligations imposed by the FCTC and has arguably exerted the most significant influence on public health policy in both developed and developing countries.<sup>90</sup> The Article 8 guidelines uniquely make an explicit association between effective implementation and the fulfillment of other obligations imposed on States under international human rights law, while also clearly defining obligatory terms in the treaty; “effective measure” is defined as 100% smoke-free air in the guidelines.<sup>91</sup> This section discusses not only the treaty text and guidelines, but also the specific human rights affected by exposure to tobacco smoke.

The treaty text provides that:

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.

2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.<sup>92</sup>

The Article 8 guidelines address the importance of protecting people from exposure to tobacco smoke. It is the aim of the Article 8 guidelines to “assist Parties in meeting their obligations under Article 8 of the Convention.”<sup>93</sup>

---

<sup>89</sup> FCTC, *supra* note 11, art. 3.

<sup>90</sup> *Smoke-free Areas*, TOBACCO ATLAS, <http://tobaccoatlas.org/smokefreeareas.html> (last visited Nov. 20, 2010). A growing number of countries have passed smoke-free laws, including Bhutan, Chad, Colombia, Djibouti, Guatemala, Guinea, Iceland, Iran, Ireland, Lithuania, Marshall Islands, Mauritius, New Zealand, Norway, Panama, Turkey, Tuvalu, the United Kingdom, Uruguay, and Zambia. All Canadian provinces/territories and Australian states/territories have also enacted such laws. *Id.*; WHO, TUVALU: WESTERN PAC. REGION 406–07 (2002), available at <http://www.who.int/tobacco/media/en/Tuvalu.pdf>.

<sup>91</sup> WHO Guidelines, *supra* note 25, para. 16.

<sup>92</sup> FCTC, *supra* note 11, art. 8.

<sup>93</sup> WHO Guidelines, *supra* note 25, para. 1.

The Article 8 guidelines contain conditional language as well as mandatory obligations: "Parties are encouraged to use these guidelines not only to fulfil their legal duties under the Convention, but also to follow best practices in protecting public health."<sup>94</sup> The Article 8 guidelines provide in pertinent part:

3. These guidelines have two related objectives. The first is to assist Parties in meeting their obligations under Article 8 of the WHO Framework Convention, in a manner consistent with the scientific evidence regarding exposure to second-hand tobacco smoke and the best practice worldwide in the implementation of smoke free measures, in order to establish a high standard of accountability for treaty compliance and to assist the Parties in promoting the highest attainable standard of health. *The second objective is to identify the key elements of legislation necessary to effectively protect people from exposure to tobacco smoke, as required by Article 8.*<sup>95</sup>

On the one hand, paragraph 3 suggests that the guidelines represent an aspirational standard, "best practice" for treaty implementation. On the other hand, the second sentence of paragraph 3 states specifically that the guidelines identify the necessary elements of smoke-free legislation as required by Article 8. Applying Article 31(3)(a) of the Vienna Convention to the Article 8 guidelines, the most reasonable conclusion is that any paragraphs that identify "elements" of legislation necessary to protect people from tobacco smoke constitute required action under the treaty—as well as international human rights law—except where discretion is permitted.<sup>96</sup>

For example, paragraph 16 states that "smoke free air" is air that is 100% smoke-free, while paragraph 18 concedes that "the precise definition of 'public places' will vary between jurisdictions . . . ."<sup>97</sup> Paragraphs 13 through 27 outline the "key elements of legislation necessary to effectively protect people" from tobacco smoke.<sup>98</sup>

### Definitions

13. In developing legislation, it is important to use care in defining key terms. Several recommendations as to appropriate

---

<sup>94</sup> *Id.* para. 2.

<sup>95</sup> *Id.* para. 3 (emphasis added).

<sup>96</sup> Vienna Convention, *supra* note 5, art. 31(3)(a); FCTC, *supra* note 11, art. 8.

<sup>97</sup> WHO Guidelines, *supra* note 25, paras. 16, 18.

<sup>98</sup> *Id.* paras. 3, 13–27.

definitions, based on experiences in many countries, are set out here . . . .

“Second-hand tobacco smoke” or “environmental tobacco smoke”

14. Several alternative terms are commonly used to describe the type of smoke addressed by Article 8 of the WHO Framework Convention. These include “second-hand smoke”, “environmental tobacco smoke”, and “other people’s smoke”. Terms such as “passive smoking” and “involuntary exposure to tobacco smoke” should be avoided, as experience in France and elsewhere suggests that the tobacco industry may use these terms to support a position that “voluntary” exposure is acceptable. “Second-hand tobacco smoke”, sometimes abbreviated as “SHS”, and “environmental tobacco smoke”, sometimes abbreviated “ETS”, are the preferable terms; these guidelines use “second-hand tobacco smoke.”

15. Second-hand tobacco smoke can be defined as “the smoke emitted from the burning end of a cigarette or from other tobacco products usually in combination with the smoke exhaled by the smoker.”

16. “Smoke free air” is air that is 100% smoke free. This definition includes, but is not limited to, air in which tobacco smoke cannot be seen, smelled, sensed or measured.<sup>99</sup>

“Smoking”

17. This term should be defined to include being in possession or control of a lit tobacco product regardless of whether the smoke is being actively inhaled or exhaled.

“Public places”

18. While the precise definition of “public places” will vary between jurisdictions, it is important that legislation define this term as broadly as possible. The definition used should cover

---

<sup>99</sup> “It is possible that constituent elements of tobacco smoke may exist in air in amounts too small to be measured. Attention should be given to the possibility that the tobacco industry or the hospitality sector may attempt to exploit the limitations of this definition.” *Id.* at 3 n.1.

all places accessible to the general public or places for collective use, regardless of ownership or right to access.

“Indoor” or “enclosed”

19. Article 8 requires protection from tobacco smoke in “indoor” workplaces and public places. Because there are potential pitfalls in defining “indoor” areas, the experiences of various countries in defining this term should be specifically examined. The definition should be as inclusive and as clear as possible, and care should be taken in the definition to avoid creating lists that may be interpreted as excluding potentially relevant “indoor” areas. It is recommended that “indoor” (or “enclosed”) areas be defined to include any space covered by a roof or enclosed by one or more walls or sides, regardless of the type of material used for the roof, wall or sides, and regardless of whether the structure is permanent or temporary.

“Workplace”

20. A “workplace” should be defined broadly as “any place used by people during their employment or work.” This should include not only work done for compensation, but also voluntary work, if it is of the type for which compensation is normally paid. In addition, “workplaces” include not only those places at which work is performed, but also all attached or associated places commonly used by the workers in the course of their employment, including, for example, corridors, lifts, stairwells, lobbies, joint facilities, cafeterias, toilets, lounges, lunchrooms and also outbuildings such as sheds and huts. Vehicles used in the course of work are workplaces and should be specifically identified as such.

21. Careful consideration should be given to workplaces that are also individuals’ homes or dwelling places, for example, prisons, mental health institutions or nursing homes. These places also constitute workplaces for others, who should be protected from exposure to tobacco smoke.



“Public transport”

22. Public transport should be defined to include any vehicle used for the carriage of members of the public, usually for reward or commercial gain. This would include taxis.

THE SCOPE OF EFFECTIVE LEGISLATION

23. Article 8 requires the adoption of effective measures to protect people from exposure to tobacco smoke in (1) indoor workplaces, (2) indoor public places, (3) public transport, and (4) “as appropriate” in “other public places.”<sup>100</sup>

Paragraph 24 is specific as to the obligation upon Parties to create 100% smoke-free environments:

24. This creates an *obligation to provide universal protection* by ensuring that all indoor public places, all indoor workplaces, all public transport and possibly other (outdoor or quasi-outdoor) public places are free from exposure to second-hand tobacco smoke. No exemptions are justified on the basis of health or law arguments. If exemptions must be considered on the basis of other arguments, these should be minimal. In addition, if a Party is unable to achieve universal coverage immediately, Article 8 creates a continuing obligation to move as quickly as possible to remove any exemptions and make the protection universal. Each Party should strive to provide universal protection within five years of the WHO Framework Convention’s entry into force for that Party.<sup>101</sup>

Similarly, paragraph 6 provides unequivocally that:

Effective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke-free environment.<sup>102</sup>

---

<sup>100</sup> *Id.* paras. 13–23. See *supra* note 73 and accompanying text (discussing WHO tobacco industry efforts).

<sup>101</sup> *WHO Guidelines*, *supra* note 25, para. 24.

<sup>102</sup> *Id.* para. 6.

The remaining guidelines specifying aspects of legislation necessary to protect people from tobacco smoke state that:

25. No safe levels of exposure to second-hand smoke exist, and, as previously acknowledged by the Conference of the Parties in decision FCTC/COP1(15), engineering approaches, such as ventilation, air exchange and the use of designated smoking areas, do not protect against exposure to tobacco smoke.

26. Protection should be provided in all indoor or enclosed workplaces, including motor vehicles used as places of work (for example, taxis, ambulances or delivery vehicles).

27. The language of the treaty requires protective measures not only in all "indoor" public places, but also in those "other" (that is, outdoor or quasi-outdoor) public places where "appropriate". In identifying those outdoor and quasi-outdoor public places where legislation is appropriate, Parties should consider the evidence as to the possible health hazards in various settings and should act to adopt the most effective protection against exposure wherever the evidence shows that a hazard exists.<sup>103</sup>

The remaining guidelines are qualified by stating that Parties "should" undertake certain measures related to involving the public in smoke-free efforts, compliance and enforcement and monitoring and evaluation. For the latter category in particular, the guidelines impose only a broad suggestion necessarily limited by "available expertise and resources."<sup>104</sup>

Paragraphs 28 through 30 focus on public awareness campaigns and the involvement of the civil community. The guidelines note that the effects of second-hand smoke need to be disseminated and outline the key stakeholders in this respect such as businesses, restaurants, and hospitality associations.<sup>105</sup> The Article 8 guidelines urge legislation to impose liability primarily on two stakeholders—business establishments and individual smokers.<sup>106</sup> However, the duties to be imposed on them are couched in discretionary terms.

Similarly, penalties set aside for violations of the duties are left to the discretion of the Parties to adjudge according to the idiosyncrasies of the customary and legal environment of each individual country. Penalties

---

<sup>103</sup> *Id.* paras. 25–27.

<sup>104</sup> *Id.* para. 47.

<sup>105</sup> *Id.* paras. 28–30.

<sup>106</sup> *Id.* para. 31.

should “deter violations or else they may be ignored by violators or treated as mere costs of doing business.”<sup>107</sup> The guidelines leave it to each State Party whether or not to impose administrative and criminal sanctions over and above monetary sanctions according to the “country’s legal and cultural context.”<sup>108</sup>

Article 8 imposes a continuing obligation on the States Parties to make protection universal by doing away with any exemptions under domestic law and encourages States to fulfill their obligations within five years of accession or ratification.<sup>109</sup> The five-year time limit is recommended because insufficient resources may delay the establishment and implementation of 100% smoke-free public places.<sup>110</sup> Developing countries, for example, may face this limitation, although the guidelines are clear that implementation can often be accomplished inexpensively.<sup>111</sup>

The “key elements of legislation necessary to effectively protect people from exposure to tobacco smoke” represent the strongest obligatory language within any of the guidelines,<sup>112</sup> although Parties may still resist implementation on the basis that the guidelines represent “best practice” and certain elements of recommended national legislation like “public places” provide significant discretion to national law-making authorities.<sup>113</sup>

### *1. International Human Rights Law*

Uniquely, the Article 8 guidelines emphasize the relationship between smoke-free public places and human rights, declaring, “The duty to protect from tobacco smoke, embodied in the text of Article 8, is grounded in fundamental human rights and freedoms.”<sup>114</sup> Paragraph 4(b) imposes a legislative duty on Member States, mandating, “The duty to protect individuals from tobacco smoke corresponds to an obligation by governments to enact legislation to protect individuals against threats to their fundamental rights and freedoms.”<sup>115</sup>

---

<sup>107</sup> *Id.* para. 32.

<sup>108</sup> *Id.* para. 34.

<sup>109</sup> *Id.* para. 24.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* para. 39.

<sup>112</sup> *Id.* para. 3.

<sup>113</sup> *Id.* paras. 2, 18.

<sup>114</sup> *Id.* para. 4(a). By contrast, the only rights referred to in the Article 5.3 and thirteen guidelines are sovereign rights, although the right to free expression and speech is implied in the latter. Article 11 refers to the “principle that every person should be informed . . .” *Guidelines for Implementation: Arts. 5.3, 8, 11, 13, supra* note 13, at 33.

<sup>115</sup> *WHO Guidelines, supra* note 25, para. 4(b).

The guidelines explicitly mention that the duty to protect from second-hand smoke is derived from, among other rights, the right to life and the right to the highest attainable standard of health<sup>116</sup> identified in the Constitution of the World Health Organization, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For FCTC Parties that have also ratified these instruments, failure to protect citizens from tobacco smoke constitutes a violation of their human rights.<sup>117</sup> While the FCTC is not itself a human rights treaty, its explicit connection with certain human rights instruments may give it an iterative role in the fulfillment of human rights treaties (i.e., while the FCTC does not impose an obligation for States Parties to provide citizens the highest attainable standard of health (as does the ICESCR), it can inform the content of that human right).

For example, as a legally binding international convention, ratifying States are legally bound to ensure that children can enjoy all of the rights guaranteed under the U.N. Convention on the Rights of the Child, including the right to the highest attainable standard of health and, more specifically, protection from the harms of tobacco.<sup>118</sup> The U.N. Committee on the Rights

<sup>116</sup> See, e.g., Report of the Committee on the Elimination of Discrimination Against Women: Kazakhstan, ¶ 105, U.N. GAOR, 24th Sess., U.N. Doc. A/56/38 (Oct. 12, 2000) (expressing concern about the status of women's health, including their increasing use of tobacco); U.N. Comm. on Econ., Soc., & Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, ¶¶ 15, 51, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment 14] (recommending that States Parties recognize the right to health by undertaking information campaigns regarding the adverse consequences of cigarette smoking and by discouraging the use of tobacco); Concluding Observations of the Committee on the Rights of the Child: South Africa, ¶ 31, 23d Sess., 615th mtg., U.N. Doc. CRC/C/15/Add.122 (Feb. 22, 2000) (expressing concern about the limited availability of programs, services, and the lack of adequate data in the area of adolescent health, including tobacco use).

<sup>117</sup> See generally Robin Appleberry, *Breaking the Camel's Back: Bringing Women's Human Rights to Bear on Tobacco Control*, 13 YALE J.L. & FEMINISM 71, 84-88 (2001) (characterizing governments' failures to prevent tobacco-related deaths and to provide regular health screenings for female tobacco users and gender-specific treatment for tobacco-related diseases as violations of women's human rights); Lucien J. Dhooze, *Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations*, 22 FORDHAM INT'L L.J. 355, 414-24 (1998) (arguing that the U.S. government's subsidization and exportation of tobacco products is inconsistent with the rights to life and health); Jonathan Wike, *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 VAND. J. TRANSNAT'L L. 329, 351-52 (1996) (characterizing the promotion of tobacco consumption as a violation of the right to health). The interesting point is not necessarily what the obligation would be under the ICESCR, but whether the two treaties, when read together, create higher obligations than each would individually.

<sup>118</sup> U.N. Comm. on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Art. 44, Para. 1(6), of the Convention*, ¶ 157, U.N. Doc. CRC/C/58 (Nov. 20, 1996). States that have ratified,

of the Child has also made general recommendations regarding the need for more effective tobacco information campaigns and the importance of tobacco advertising restrictions, as detailed in the guidelines issued pursuant to Articles 11 and 13.<sup>119</sup>

Pursuant to Article 12(1) of the ICESCR, States Parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>120</sup> Article 12(2) sets forth a number of affirmative steps to be taken by States Parties to achieve the full realization of the right to health, including, in relevant part, provisions for the reduction of the stillbirth rate and of infant mortality, the healthy development of the child, the improvement of environmental and industrial hygiene, and the prevention, treatment, and control of epidemic and occupational diseases.<sup>121</sup>

The ICESCR construes Article 12 to require States Parties to implement certain tobacco control measures, which are referenced in General Comment 14.<sup>122</sup> The ICESCR also specifies that a State Party’s obligation to improve environmental and industrial hygiene includes discouraging the “use of tobacco, drugs and other harmful substances.”<sup>123</sup> In addition, General Comment 14 provides that a State Party’s failure to take all necessary measures to safeguard persons within its jurisdiction from infringements of the right to health by third parties, including commercial entities, constitutes a violation of its Article 12 obligations.<sup>124</sup>

The U.N. Committee on Economic, Social, and Cultural Rights’ (UNCESCR) proceedings has regularly addressed tobacco control. Some governments discuss their tobacco control policies in the periodic reports issued to the UNCESCR Committee.<sup>125</sup> In addition, UNCESCR members

---

acceded, or succeeded to the Convention on the Rights of the Child can be found at the following website: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I V-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I V-11&chapter=4&lang=en).

<sup>119</sup> U.N. Comm. on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 10, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

<sup>120</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], available at <http://www2.ohchr.org/English/law/cescr.htm>.

<sup>121</sup> *Id.* Similarly, Article 7(b) of the ICESCR guarantees the right to the enjoyment of safe and healthy working conditions. *Id.*

<sup>122</sup> See General Comment 14, *supra* note 116 (noting that these measures include undertaking information campaigns regarding the adverse consequences of cigarette smoking and by discouraging the use of tobacco). In particular, States Parties are encouraged to recognize the right to health in their national political and legal systems by undertaking “information campaigns, in particular with respect to . . . the use of cigarettes, drugs and other harmful substances.” *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., U.N. Comm. on Econ., Soc., & Cultural Rights, *Summary Record of the 16th Meeting*, ¶¶ 4, 32, U.N. Doc. E/C.12/1999/SR.16 (May 10, 1999) (highlighting that due to a

have used constructive dialogue sessions to question certain government representatives about the status of particular tobacco control initiatives.<sup>126</sup> Following its sessions, the UNCESCR has issued recommendations regarding the need for more effective tobacco information campaigns and the importance of tobacco advertising restrictions.<sup>127</sup> For example, the Committee recently reviewed Brazil's periodic report:

30. The Committee notes with concern that it is still permissible to promote the use of tobacco through advertising in the State party and that, while the use of tobacco-derived products is banned in publicly accessible areas, smoking is permitted in areas specially designed for the purpose. The Committee notes, however, that the State party has taken important steps to reduce the threat tobacco poses for life, health, the environment and the general population by ratifying the World Health Organization's Framework Convention on

---

WHO report listing tobacco products as the "single most important factor of the disease burden facing Ireland," the Irish government instituted a national tobacco control strategy including health education programs, increased cigarette taxes, and tougher advertising restrictions); U. N. Comm. on Econ., Soc., & Cultural Rights, *Report of Armenia--Addendum to Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, ¶ 152, U.N. Doc. E/1990/5/Add.36 (Mar. 8, 1998) (citing provisions of Armenian law that prohibit minors from working in the tobacco industry or other employment that may harm their health or physical or mental development); U. N. Comm. on Econ., Soc., & Cultural Rights, *Report of Honduras--Addendum to Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, ¶¶ 201, 394, U.N. Doc. E/1990/5/Add.40 (July 17, 1998) (asserting increased prevalence of health problems connected with the use and abuse of tobacco, and noting that the constitution calls for regulation by law of the commercial advertising of tobacco products); U. N. Comm. on Econ., Soc., & Cultural Rights, *Report of Switzerland--Addendum to Initial Reports Submitted by States Parties Reports Under Articles 16 and 17 of the Covenant*, ¶ 610, U.N. Doc. E/1990/5/Add.33 (Sept. 18, 1996) (noting that the belief of both the Federal Council and the Federal Office of Public Health that smoking is harmful to its citizens' health has led to an increase in tobacco warning labels and the implementation of a comprehensive smoking prevention program).

<sup>126</sup> See, e.g., U. N. Comm. on Econ., Soc., & Cultural Rights, *Summary Record on the 8th Meeting: Italy*, U.N. Doc. E/C.12/2000/SR.8 (May 3, 2000) (discussing Italy's anti-smoking campaigns and justification for advertising Marlboro tobacco brand on Ferrari cars in Formula 1 racing competition, which was broadcast widely on Italian television, in light of tobacco advertising ban).

<sup>127</sup> See, e.g., U. N. Comm. on Econ., Soc., & Cultural Rights, *Concluding Observations: Ukraine*, U.N. Doc. E/C.12/1/Add.65 (Sept. 24, 2001) (recommending that the Ukrainian government provide children with accurate and objective information about tobacco use and discourage public mass media from promoting consumption of tobacco products); U. N. Comm. on Econ., Soc., & Cultural Rights, *Concluding Observations: Poland*, U.N. Doc. E/C.12/1/Add.26 (June 16, 1998) (recommending that the Polish government engage in a large-scale public information campaign to combat smoking).

Tobacco Control and developing public policies to reduce tobacco use. (art. 12, para. 1).

The Committee recommends that the State party take measures to ban the promotion of tobacco products and enact legislation to ensure that all enclosed public environments are completely free of tobacco.<sup>128</sup>

Because economic, social, and cultural rights can be expensive, the treaty imposes only a duty of “progressive realization” of some rights dependent on the availability of resources in various countries.<sup>129</sup> The Article 8 guidelines acknowledge this aspect of duties imposed under both the FCTC and the ICESCR, as to certain affirmative recommendations for enforcement.<sup>130</sup> However, establishing smoke-free places often results in “self-enforcement,” as the public demands a clean working and public environment, and existing inspection regimes often accommodate enforcement.<sup>131</sup>

## 2. National Constitutions

In addition to the obligation to effectively implement the Article 8 guidelines for States that have ratified the major international human rights treaties, the Article 8 guidelines refer to the “right to life and the right to the highest attainable standard of health . . . as recognized in the constitutions of many nations.”<sup>132</sup> In some countries, courts have explicitly read the obligation to protect citizens from tobacco smoke as part of the constitutional right to life, right to clean environment, and/or right to health. In Uganda, The Environmental Action Network successfully sued the Attorney General and the National Environment Management Authority for failure to issue regulations mandating smoke-free public places.<sup>133</sup> In its decision, the High

---

<sup>128</sup> U.N. Comm. on Econ., Soc., & Cultural Rights, *Concluding Observations: Brazil*, U.N. Doc. E/C.12/BRA/CO/2 (June 12, 2009).

<sup>129</sup> ICESCR, *supra* note 120, art. 2, para. 1.

<sup>130</sup> *WHO Guidelines*, *supra* note 25, paras. 2, 31.

<sup>131</sup> Indeed, since the FCTC imposes an immediate obligation to protect citizens from tobacco smoke, it probably accelerates the timeline for ‘progressive realization’ under the ICESCR. That is, the fact that the FCTC views protection from tobacco smoke as a present obligation suggests that under the ICESCR it is now time to assure the right and not some time in the distant future. Also, because the duty does not require the expenditure of considerable resources, it might also be argued to be presently realizable.

<sup>132</sup> *WHO Guidelines*, *supra* note 25, para. 4(a).

<sup>133</sup> See *Env'tl. Action Network, Ltd. (TEAN) v. Att'y Gen. & Nat. Env't Mgmt. Auth. (NEMA)*, No. 39, High Court of Uganda at Kampala (2001) [hereinafter *TEAN v. Att'y Gen. & NEMA*], available at <http://greenwatch.or.ug/pdf/judgements/TEAN%20Versus%20A.G.%20&%20NEM>

Court determined that smoking in public places constitutes a violation of the non-smoking members of the public's right to life, as prescribed under Article 22 and the non-smoking members of the public's right to a clean and healthy environment under Article 39 of the Ugandan Constitution.<sup>134</sup>

In Mexico, both interested nongovernmental organizations and individual plaintiffs are claiming that Mexico's recently enacted tobacco control law insufficiently protects the right to health that is guaranteed under Article 4 of the Mexican Constitution.<sup>135</sup> According to the plaintiffs, constitutional rights are normally determined by the legislature because the Constitution establishes only a simply stated right without significant guidance as to its content.<sup>136</sup> However, in the case of the right of the public to be protected from the dangers of tobacco, Mexico signed and ratified the FCTC, which therefore became Mexican law under Article 133 of the Mexican Constitution, which provides that ratified treaties are "Supreme Law of the entire Union."<sup>137</sup> Because the FCTC provides "known and detailed" restrictions on tobacco use, advertising, and promotion, the plaintiffs argue that the Mexican legislature may not pass a law with standards lower than those set forth in the FCTC for tobacco promotion and protection from second-hand smoke.<sup>138</sup>

The tobacco industry and associated interests assert rights as well. Typically the industry argues that mandatory, as opposed to voluntarily, imposed smoke-free public places, as detailed in Article 8(2) of the FCTC, violates personal liberty or private property rights (for hotel and restaurant owners, for example).<sup>139</sup> Yet under both international law and domestic law, rights are generally balanced against the responsibility of the State to protect public health.<sup>140</sup> As the Guatemala Constitutional Court determined,

---

A.pdf (ruling that failure to protect citizens from tobacco smoke violated the right to life and the right to a clean environment in the Ugandan Constitution).

<sup>134</sup> *Id.*

<sup>135</sup> Oscar A. Cabrera & Alejandro Madrazo, *Human Rights as a Tool for Tobacco Control in Latin America*, 52 SALUD PÚBLICA DE MÉXICO S288, S288-97 (2010) (detailing the litigation strategy of these plaintiffs).

<sup>136</sup> *Id.*

<sup>137</sup> Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>138</sup> See Personalidad. En Contra Ley General para el Control del Tabaco, Procede el Amparo Indirecto, Daniel Gershenson Shapiro Expediente en Juicio de Origen: 1802/2008 Recurso de Revisión (arguing that the Mexican legislature is in breach of the FCTC provisions to which it agreed to abide).

<sup>139</sup> Jessica Niezgoda, *Kicking Ash(Trays): Smoking bans in Public Workplaces, Bars, and Restaurants Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS. 99, 111-13 (2006).

<sup>140</sup> See Tamara Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2587 (2008) (discussing the impact that extending First Amendment rights to corporations will have on the government's ability to regulate public healthcare, safety, and



the establishing of limits on smoking in certain places does not imply [as alleged by the Guatemala Chamber of Commerce] that the State has promoted a limitation of the freedom of industry and commerce of the entities manufacturing . . . and marketing tobacco products, as the purpose of the challenged norm is not to regulate such activities, but to regulate their consumption to protect the right to health of the consumers themselves, and that of nonsmokers.<sup>141</sup>

Indeed, national authorities interpreting the right to life have arrived at different conclusions as to the extent to which smoke-free public places can be read to be part of that right under domestic law.<sup>142</sup>

### *C. Article 11: Packaging and Labeling of Tobacco Products*

Tobacco manufacturers and their affiliated marketers and advertisers have been shown to manipulate the information on tobacco product packaging, including the shape and size of the package itself, to increase the likelihood that the product will be purchased and consumed. This manipulation includes minimizing or obfuscating mandatory health warnings, using misleading descriptors like “light,” and “ultra-light,” and shaping cigarette containers—e.g., to mimic famous perfume packaging or a lipstick container—to appeal to target populations.<sup>143</sup> The most recent packaging and labeling innovations include the use of “tear tape” to promote product use and shape messages as to recent legislative or product changes.

---

general welfare). See also PUBLIC HEALTH LAW AND ETHICS 51–52 (Lawrence O. Gostin ed., 2002) (stating that the government is primarily responsible for assuring the health of its people); Chuan-Feng Wu, *State Responsibility for Tobacco Control: The Right to Health Perspective*, 3 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 379, 380 (2008) (discussing the government’s responsibility to protect its citizens’ “internationally recognized right to health”). See generally Tom L. Beauchamp & Ruth R. Faden, *The Right to Health and the Right to Health Care*, 4 J. MED. & PHIL. 118 (1979) (discussing whether the state has both affirmative and negative duties to provide health care to its people).

<sup>141</sup> Decision of the Guatemala Constitutional Court [Docket 2158-2009] p. 15 (on file with author).

<sup>142</sup> See *TEAN v. Att’y Gen. & NEMA*, *supra* note 133 (ruling that failure to protect citizens from tobacco smoke violated the right to life and the right to a clean environment in the Ugandan Constitution). See, e.g., *Wöckel v. Germany*, App. No. 32165/96, 25 Eur. Comm’n H.R. Dec. & Rep. 156 (1998) (holding that the German legislature’s failure to enact more far-reaching prohibitions on public smoking did not violate the applicant’s right to life under Article 2 of the European Convention on Human Rights in light of other tobacco control measures implemented by the German government).

<sup>143</sup> CAMPAIGN FOR TOBACCO FREE KIDS ET AL., DEADLY IN PINK: BIG TOBACCO STEPS UP ITS TARGETING OF WOMEN AND GIRLS 2 (2009), available at <http://www.rwjf.org/files/research/20090218deadlyinpink.pdf>.

Article 4 of the FCTC sets forth the guiding principle that “every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption . . . .”<sup>144</sup> This principle undergirds not only Article 11 on packaging and labeling, but also Article 13 recommendations aimed at limiting tobacco advertising, promotion, and sponsorship. Article 11 provides that:

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as “low tar,” “light,” “ultra-light,” or “mild”; and

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

(iii) shall be large, clear, visible and legible,

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,

---

<sup>144</sup> FCTC, *supra* note 11, art. 4.

(v) may be in the form of or include pictures or pictograms.

2. Each unit packet and package of tobacco products and any outside packaging and labelling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.<sup>145</sup>

3. Each Party shall require that the warnings and other textual information specified in paragraphs 1(b) and paragraph 2 of this Article will appear on each unit packet and package of tobacco products and any outside packaging and labelling of such products in its principal language or languages.<sup>146</sup>

The Article 11 guidelines explicitly address the importance of requiring effective packaging and labeling measures to protect consumers.<sup>147</sup> It is the

---

<sup>145</sup> *Id.* art. 11. See also The O'Neill Institute et al., Shadow Report to the Periodic Report by the Government of Brazil, *Preventing and Reducing Tobacco Use in Brazil: Pending Tasks; Addendum Regarding Methods for Tar and Nicotine Measurement*, U.N. Comm. on Econ., Soc., & Cultural Rights, 42nd Sess., paras. 1–3 (May 4–22, 2009), available at [http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/PrevReduceTobacco\\_Brazil42.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/PrevReduceTobacco_Brazil42.pdf).

In 1966, the United States Federal Trade Commission (FTC) adopted a standardizing testing method, known as the Cambridge Filter Method or FTC method, for the measurement of tar and nicotine yields of cigarette smoke. Under the International Organization for Standardisation (ISO), similar testing methods were adopted for use around the world. There are two major weaknesses built into health claims based on the ISO/FTC methods: (1) machine-measurements of tar and nicotine are not valid estimates of the amounts of tar or nicotine received by smokers; and (2) many smokers mistakenly believe that lower yield or light cigarettes deliver less tar, produce lower rates of disease and are therefore 'safer.' In 2008, the FTC rescinded its guidance regarding the FTC machine-based testing stating that 'machine-based measurements of tar and nicotine yields based on the Cambridge Filter Method do not provide meaningful information on the amounts of tar and nicotine smokers receive from cigarettes or on the relative amounts of tar and nicotine they are likely to receive from smoking different brands of cigarettes.' They found the machine-based testing to be 'poor predictors of tar and nicotine exposure [. . .] primarily due to smoker compensation — i.e., the tendency of smokers of lower-rated cigarettes to take bigger, deeper, or more frequent puffs, or to otherwise alter their smoking behavior in order to obtain the dosage of nicotine they need.'

*Id.*

<sup>146</sup> FCTC, *supra* note 11, art. 4.

<sup>147</sup> See, e.g., Österreichische Schutzgemeinschaft Für Nichtraucher and Rockenbauer v. Austria, App. No. 17200/91, Eur. Comm'n H.R. Dec. & Rep. (1991) (holding that restrictions

aim of the Article 11 guidelines to “assist Parties in meeting their legal obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labeling measures.”<sup>148</sup> While the Article 11 guidelines contain much of the conditional language found elsewhere in the guidelines, certain obligations flow from the mandatory language of the treaty text—specifically that States Parties: (1) take effective measures within three years of ratification or accession; (2) do not, in accordance with national law, permit descriptors that may mislead consumers as to the health effects of tobacco products, including the impression that one tobacco product is less harmful than another; (3) take “effective measures” to include warnings that are rotating, large (no less than 30% of package area), clear, visible, and legible; and (4) use warnings that contain information on constituents and emissions.<sup>149</sup> Those provisions of the guidelines related to meeting these Article 11 obligations are mandatory while those that are proposed to increase effectiveness are or may be advisory to the extent they can be distinguished. Certainly, when determining its own obligations, a State is obliged to consider the guidelines in their entirety, since they represent the body of research that informs “effective measures” for purposes of implementation:

8. Article 11.1(b)(iii) of the Convention specifies that each Party shall adopt and implement effective measures to ensure that health warnings and messages are large, clear, visible and legible. The location and layout of health warnings and messages on a package should ensure maximum visibility. Research indicates that health warnings and messages are more visible at the top rather than the bottom of the front and back of packages. Parties should require that health warnings and messages be positioned:

---

on advertising that misleads consumers about the health risks of tobacco products are consistent with the right to freedom of expression under Article 10 of the European Convention on Human Rights); U.N. Comm. on the Rights of the Child, *Concluding Observations: Armenia*, ¶ 53, U.N. Doc. CRC/C/15/Ad.119 (Feb. 24, 2000) (encouraging the State Party to continue its efforts to provide children with accurate and objective information about tobacco use and to protect them from harmful misinformation by imposing comprehensive restrictions on tobacco advertising).

<sup>148</sup> FCTC, *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and Labeling of Tobacco Products)*, art. 1 (2009) [hereinafter *Guidelines for Implementation: Art. 11*], available at [http://www.who.int/fctc/guidelines/article\\_11.pdf](http://www.who.int/fctc/guidelines/article_11.pdf).

<sup>149</sup> FCTC, *supra* note 11, art. 11.

- on both the front and back (or on all main faces if there are more than two) of each unit packet and package, rather than just one side, to ensure that health warnings and messages are highly visible, recognizing that the frontal display area is the one most visible to the user for most package types;
- on principal display areas and, in particular, at the top of the principal display areas rather than at the bottom to increase visibility; and
- in such a way that normal opening of the package does not permanently damage or conceal the text or image of the health warning.<sup>150</sup>

However, the Article 11 guidelines make extensive use of the phrase “should consider,” the ordinary meaning of which advises Parties to include those recommendations as part of its deliberative process without a corresponding duty to actually act on those recommendations. For example, Parties “should consider” warnings larger than 50% of principal display areas,<sup>151</sup> messages on adverse environmental outcomes and tobacco industry practices, targeting subgroups, pre-marketing testing, plain packaging, responsibility for enforcement, liability related to noncompliance, source documents, specific penalties available to enforcement agencies, adequate budgeting, inspectors, public complaint mechanisms, monitoring and evaluation, impact on target populations, and international cooperation.

The guidelines include stronger recommendations as well. Parties “should require,” *inter alia*, color warnings, health warnings, and messages in a specified series to be printed, and “relevant qualitative statements be displayed on each unit packet or package about the emissions of the tobacco product.”<sup>152</sup> Similarly, Parties “should also prohibit” any term, descriptor, trademark, or sign that creates the impression that a particular tobacco product is less harmful than others, although the FCTC and the guidelines suggest that such descriptors “may include terms such as ‘low tar,’ ‘light,’ ‘ultra-light’ or ‘mild.’”<sup>153</sup> The guidelines are clear that the use of the word “may” means those descriptors are indicative but not exhaustive. The

---

<sup>150</sup> *Guidelines for Implementation: Art. 11*, *supra* note 148, para. 8.

<sup>151</sup> *Id.* para. 12.

<sup>152</sup> *Id.* para. 33. For example, read together with Article 11’s requirement for “effective measures,” the evidence that qualitative disclosures are misleading and the guidelines’ language lead to more than a mere recommendation. *Id.* para. 36.

<sup>153</sup> *Id.* para. 43.

guidelines, like the treaty provision, therefore establish three gradations of terms Parties must consider for purposes of interpretation and implementation: "required" actions, including warnings on principal display areas; actions to "ensure" a given outcome, like tax stamps not obscuring warnings; and, actions parties "should consider," like warnings larger than 50% of principal display areas.

#### *D. Article 13: Advertising, Promotion, and Sponsorship*

While Article 11 sets forth effective measures for packaging and labeling, Article 13 focuses on the pervasive influence of tobacco industry advertisement and marketing to increase consumption and obfuscate the health risks of tobacco use. Tobacco advertising has been shown to increase consumption and attract new smokers.<sup>154</sup> New smokers in particular tend to be young and influenced by tobacco advertisements' association between tobacco and sexual and/or social success, athleticism, courage, and independence; these attributes easily fascinate adolescents.<sup>155</sup> The more exposed to tobacco advertising young people are, the more likely they are to use tobacco, which quickly translates into addiction in adulthood.<sup>156</sup> Correspondingly, jurisdictions with comprehensive advertising bans witness declines in consumption.<sup>157</sup> The Article 13 text provides in pertinent part:

1. Parties recognize the comprehensive ban on advertising, promotion and sponsorship would reduce consumption of tobacco products.

---

<sup>154</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL, ch. 5 (2000), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr4916a1.htm>; Joe B. Tye et al., *Tobacco Advertising and Consumption: Evidence of a Causal Relationship*, 8 J. PUB. HEALTH POL'Y 492, 494-95 (1987).

<sup>155</sup> David T. Levy, Frank Chaloupka & Joseph Gitchell, *The Effects Of Tobacco Control Policies On Smoking Rates: A Tobacco Control Scorecard*, 10 J. PUBLIC HEALTH MGMT. & PRACTICE 338, 338-53 (2004).

<sup>156</sup> Joseph R. DiFranza et al., *Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality*, 117 PEDIATRICS e1237, e1237, <http://pediatrics.aappublications.org/cgi/content/full/117/6/e1237>; C. Lovato et al., *Impact of Tobacco Advertising and Promotion on Increasing Adolescent Smoking Behaviours*, COCHRANE DATABASE OF SYSTEMATIC REVIEWS CD003439 (2003), available at <http://onlinelibrary.wiley.com/doi/cochrane/clsystrev/articles/CD003439/pdf.fs.html>; Dean M. Krugman et al., *Understanding the Role of Cigarette Promotion and Youth Smoking in a Changing Marketing Environment*, 10 J. HEALTH COMM. 261, 261-78 (2005); Robert J. Wellman et al., *The Extent to Which Tobacco Marketing and Tobacco Use in Films Contribute to Children's Use of Tobacco: A Meta-Analysis*, 160 ARCHIVES PEDIATRICS & ADOLESCENT MED. 1285, 1285-96 (2006), available at <http://archpedi.ama-assn.org/cgi/reprint/160/12/1285.pdf>.

<sup>157</sup> Evan Blecher, *The Impact of Tobacco Advertising Bans on Consumption in Developing Countries*, 27 J. HEALTH ECON. 930, 930 (2008).

2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

(a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;

(b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;

(c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;

(d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising,

promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;

(e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and

(f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.<sup>158</sup>

The Article 13 guidelines explicitly address the importance of implementing effective regulation of tobacco advertising, promotion, and sponsorship.<sup>159</sup> It is the aim of these guidelines “to assist Parties in meeting their obligations under Article 13” of the Convention.<sup>160</sup> They are meant to “provide guidance on the best ways to implement Article 13 of the Convention in order to eliminate tobacco advertising, promotion and sponsorship effectively at both domestic and international levels.”<sup>161</sup> The Article 13 guidelines state that Parties “should” adopt the recommended measures, although it concedes that some Parties’ “constitutions or constitutional principles” may limit their ability to undertake a “comprehensive” ban as outlined in the guidelines.<sup>162</sup> A comprehensive ban has a broad scope that covers “any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.”<sup>163</sup> A comprehensive ban also includes “any form of contribution” as well as “corporate social responsibility” programs promoted by the tobacco

---

<sup>158</sup> FCTC, *supra* note 11, art. 13.

<sup>159</sup> FCTC, *Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control* (Nov. 2, 2008) [hereinafter *Guidelines for Implementation: Art. 13*], available at [http://www.who.int/fctc/guidelines/article\\_13.pdf](http://www.who.int/fctc/guidelines/article_13.pdf).

<sup>160</sup> *Id.* para. 1.

<sup>161</sup> *Id.* para. 2.

<sup>162</sup> *Id.* paras. 1, 7. Indeed, there are existing suits in Argentina and the United States (neither a Party to the FCTC) that challenge advertising restrictions on constitutional principles of commercial speech.

<sup>163</sup> *Id.* para. 7.



industry.<sup>164</sup> As with the language found elsewhere in the guidelines, the Article 13 guidelines are sometimes styled “recommendations.” These recommendations, together with their designation as the “best ways” to implement Article 13, suggest that they are largely advisory for Parties. Moreover, certain recommendations, like plain packaging, use the “should consider” language of Article 11:

17. If plain packaging is not yet mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to consumers such as animal or other figures, “fun” phrases, coloured cigarette papers, attractive smells, novelty or seasonal packs.

*Recommendation*

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging.<sup>165</sup>

The guidelines to Article 13 also give wide discretion to parties as to the limits imposed by their constitutional systems:

35. Any Party whose constitution or constitutional principles impose constraints on undertaking a comprehensive ban should, under Article 13 of the Convention, apply restrictions that are as comprehensive as possible in the light of those constraints. All Parties are obliged to undertake a comprehensive ban unless they are “not in a position” to do so “due to [their] constitution or constitutional principles”. This obligation is to be interpreted in the context of the “recogni[tion] that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products”, and in the light of the Convention’s overall objective “to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.”<sup>166</sup>

---

<sup>164</sup> *Id.* para. 26.

<sup>165</sup> *Id.* para. 17.

<sup>166</sup> *Id.* para. 35.

36. It is acknowledged that the question of how constitutional principles are to be accommodated is to be determined by each Party's constitutional system.<sup>167</sup>

For Parties whose constitutional principles prevent a ban as comprehensive as envisioned by the treaty and the guidelines, these Parties are nevertheless obligated to undertake as comprehensive a ban as permitted by their constitutional principles.<sup>168</sup> Finally, the Article 13 guidelines, like the Article 5.3 guidelines, contemplate a protocol to address cross-border advertising, promotion, and sponsorship.<sup>169</sup> Thus, the Article 13 guidelines share many of the characteristics of the Article 5.3 and Article 11 guidelines and provide significant discretion to Parties in determining whether their constitutional systems prohibit a comprehensive ban as outlined in the guidelines.

While the text of Article 13 and the guidelines do not invoke a "right to information" as articulated under both international human rights law and the constitutional law of several States, the guidelines may play a part in informing the content of that right. For example, the U.N. Committee on the Rights of the Child (CRC Committee) has identified tobacco consumption under the Convention's state reporting guidelines.<sup>170</sup> Under the General Guidelines for Periodic Reports established by the CRC Committee, States are requested to "provide information on legislative and other measures taken to prevent the use by children of" such substances.<sup>171</sup> In its 2000 Concluding Observations for South Africa, the CRC Committee stated that they expressed "concern regarding the limited availability of [programs] and services and the lack of adequate data" in a range of areas, "including alcohol and tobacco use."<sup>172</sup>

Similarly, CEDAW makes an explicit link between its textual provisions regarding women's health and tobacco control.<sup>173</sup> The Fourth World Conference on Women held in Cairo, and its accompanying Beijing Platform for Action, acknowledged, "There is significant synergy between the substantive content of [CEDAW] and the Beijing Platform for Action and

---

<sup>167</sup> *Id.* para. 36.

<sup>168</sup> *Id.* para. 1.

<sup>169</sup> *Id.* para. 10.

<sup>170</sup> U.N. Comm. on the Rights of the Child, *General Guidelines for Periodic Reports*, ¶ 157, U.N. Doc. CRC/C/58 (Nov. 20, 1996).

<sup>171</sup> *Id.*

<sup>172</sup> U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: South Africa*, ¶ 31, U.N. Doc. CRC/C/15/Add.122 (Feb. 23, 2000).

<sup>173</sup> WHO, *Women's Rights and International Agreements*, in GENDER, WOMEN, AND THE TOBACCO EPIDEMIC 233 (2010) available at [http://www.who.int/tobacco/publications/gender/en\\_tfi\\_gender\\_women\\_rights\\_international\\_agreements.pdf](http://www.who.int/tobacco/publications/gender/en_tfi_gender_women_rights_international_agreements.pdf).

they are therefore mutually reinforcing.”<sup>174</sup> Paragraph 100 of the Beijing Platform for Action also stated, “Women throughout the world, especially young women, are increasing their use of tobacco with serious effects on their health and that of their children.”<sup>175</sup> States Parties are under an obligation to “[c]reate awareness among women, health professionals, policy makers and the general public about the serious but preventable health hazards stemming from tobacco consumption and the need for regulatory and education measures to reduce smoking as important health promotion and disease prevention activities.”<sup>176</sup>

Thus the Article 13 guidelines do not provide the same level of obligation as the Article 8 guidelines, but may nevertheless play a similar role in informing the content of other human rights and corresponding state obligations.

#### IV. THE DEBATE ON COP DECISION-MAKING UNDER INTERNATIONAL LAW

Under orthodox interpretation, the guidelines adopted through unanimous consent by the FCTC’s Conference of the Parties are without serious doubt a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” under Article 31(3)(a) of the Vienna Convention, which in turn means that States Parties must use the guidelines as part of their Article 26 obligation to interpret the treaty in good faith “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>177</sup> Recently, scholars debating the significance and legal effect of COP consensus-based activity have challenged prevailing methods—based largely on the application of the Vienna Convention on the Law of Treaties and the division of COP decisions into either “hard” law or “soft” law. This Article implicitly defends prevailing methods, while acknowledging that they contain important weaknesses in ascertaining “hard” legal obligations.<sup>178</sup> It

---

<sup>174</sup> U.N. Comm. on the Elimination of Discrimination Against Women, Annex I, *Reporting Guidelines of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. E/CN.6/2008/CRP.1 (Feb. 11, 2008), available at <http://www2.ohchr.org/English/bodies/cedaw/docs/AnnexI.pdf>.

<sup>175</sup> U.N. Entity for Gender Equality and the Empowerment of Women, 4th World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ¶ 100 (Sept. 15, 1995), <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

<sup>176</sup> *Id.* ¶ 107(o).

<sup>177</sup> Vienna Convention, *supra* note 5, art. 26, 31(3)(a); see also Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary on a Commentary*, 25 YALE J. INT’L L. 315 (2000) (noting that the Conventions of the Parties subsequent to the U.N. Framework Convention on Climate Change are elaborating on different aspects of the Convention including the Kyoto Protocol).

<sup>178</sup> Vienna Convention, *supra* note 5, art. 31(3)(a).

is suggested that these weaknesses lie not in prevailing methods for assessing COP consensus-based activity, but rather in the more fundamental problem of developing a workable theory for applying the “good faith” interpretation doctrine to “vertical” obligations undertaken by States mainly in human rights treaties, multilateral environmental treaties, framework treaties, and similar instruments.<sup>179</sup>

*A. Alternatives to Article 31(3)(a)*

In exploring the effect of the decisions of the Conferences of the Parties in the context of multilateral environmental agreements, Annecoos Wiersema argues that scholars have over-emphasized the dichotomous approach of dividing COP decisions into “hard” law—treaty or custom-based obligations—and “soft” law.<sup>180</sup> Soft law is defined as those agreements that are not legally binding but nevertheless constrain States to a lesser degree either because the obligations are imprecise, or because authority to interpret and implement the law is not delegated to an international organization or dispute resolution body.<sup>181</sup> Instead, Wiersema proposes that the degree of obligation imposed by COP consensus-based activity be understood with respect to underlying treaty obligations.<sup>182</sup>

Wiersema concedes that COP decisions may amount to a subsequent agreement by the parties, but shapes her analysis for those decisions or parts of decisions that would not “automatically elevate the activity to being seen as hard international law.”<sup>183</sup> For those decisions, Wiersema proposes four axes by which COP decisions might be understood to “thicken” underlying obligations: (1) voting and level of consent, (2) delegated consent, (3) intent, and (4) effect in implementation.<sup>184</sup> Here, these axes are modified to show that Wiersema’s framework can provide the foundation of a workable instrument for applying “good faith” in the vertical context.

This Article has already set forth its defense that the unanimous, consensus-based decisions of the FCTC’s COP qualify as a “subsequent

---

<sup>179</sup> See, e.g., Wiersema, *supra* note 27 (identifying the weaknesses within current practices in treaty interpretation).

<sup>180</sup> *Id.* at 232–33.

<sup>181</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 422 (2000); see also Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT’L L. REV. 573, 642–43 (2005) (noting that soft law agreements are legally non-binding).

<sup>182</sup> Wiersema, *supra* note 27, at 256.

<sup>183</sup> *Id.* at 247.

<sup>184</sup> *Id.* at 250–51.

agreement” under Article 31(3)(a) of the Vienna Convention.<sup>185</sup> Before applying the Wiersema framework within the context of the Vienna Convention, it is worth examining whether the FCTC guidelines might impose custom-based obligations or have force as soft international law.

### *1. Customary International Law*

The Statute of the International Court of Justice acknowledges customary international law in Article 38(1)(b), incorporated into the United Nations Charter in Article 92: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.”<sup>186</sup> Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.<sup>187</sup> Customary international law can be discerned by widespread repetition by States of similar international acts over time (state practice); acts must occur out of sense of obligation, and acts must be taken by a significant number of States and not be rejected by a significant number of States.<sup>188</sup> “A marker of customary international law is consensus among States exhibited both by widespread conduct and a discernible sense of obligation.”<sup>189</sup>

For the most part, there has been insufficient time to identify “state practice” with regard to the guidelines. Certainly, as a matter of practice, States regard guidelines issued pursuant to international treaties as binding.<sup>190</sup> Yet even where a practice becomes widespread, States must indicate that they are doing so out of a sense of obligation that they owe to the guidelines.<sup>191</sup> For example, Australia and Brazil officially represent that transparent interactions with the tobacco industry are key aspects of their

---

<sup>185</sup> Vienna Convention, *supra* note 5, art. 31(3)(a); *see supra* Part III (interpreting the FCTC).

<sup>186</sup> U.N. Charter, art. 92. SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984).

<sup>187</sup> BLACK’S LAW DICTIONARY 892 (8th ed. 2009).

<sup>188</sup> Marci Hoffman, *International and Foreign Legal Research: Customary International Law and Generally Recognized Principles* (2007), <http://www.law.berkeley.edu/library/classes/iflr/customary.html>.

<sup>189</sup> ROSENNE, *supra* note 186.

<sup>190</sup> Interview with Edith Brown Weiss, Francis Cabell Brown Profess of International Law, Georgetown University Law Center (April 21, 2010).

<sup>191</sup> *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, 45, ¶ 77 (Feb. 28), available at <http://www.icj-cij.org/docket/files/51/5535.pdf> (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

national tobacco control strategies. However, Australia makes an explicit link between transparency and its compliance with Article 5.3 guidelines, while Brazil does not.<sup>192</sup> The strongest reading of the Article 5.3 guidelines would absolutely prohibit the participation of the tobacco industry in the “formulation and implementation of public health policies for tobacco control.”<sup>193</sup> Given that major international tobacco companies like Japan Tobacco Inc. and the China National Tobacco Company are also state monopolies or have States as major stakeholders, there may be limits on the extent to which Article 5.3 guidelines may become customary international law (although Thailand provides an important case where a state-owned monopoly and a relatively strong tobacco control regime coexist).<sup>194</sup>

---

<sup>192</sup> Australian Gov't: Dept. of Health & Ageing, *Framework Convention on Tobacco Control* (last modified Sept. 1, 2010), <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-conv>.

<sup>193</sup> *Guidelines for Implementation: Art. 5.3*, *supra* note 76.

<sup>194</sup> See TOBACCO MERCHANTS ASSOC., U.S. CIGARETTE EXPORT MARKET PENETRATION IN THAILAND: A MULTIMILLION DOLLAR OPPORTUNITY FOR U.S. LEAF PRODUCERS (1988). The Thailand Tobacco Monopoly (TTM) manufactures cigarettes for local and export markets; from 1943 to 1992, TTM—which replaced British American Tobacco—was the exclusive local provider of tobacco products. Tobacco control efforts during this time largely consisted of marginal changes in health warnings as a result of pressure from public health and medical associations. *Id.* See Frank J. Chaloupka & Adit Laixuthai, *U.S. Trade Policy and Cigarette Smoking in Asia* (Nat'l Bureau of Econ. Research, Working Paper No. 5543, 1996), available at <http://papers.nber.org/papers/w5543> (discussing the health policy response of Asian countries once markets were opened to the U.S. cigarette industry). See also Sombat Chantornvong & Duncan McCargo, *Political Economy of Tobacco Control in Thailand*, 10 TOBACCO CONTROL 48, 48–54 (2001), available at <http://tc.bmjournals.com/cgi/content/full/10/1/48>. In 1992, Thailand opened its tobacco markets in response to trade sanction threats by the United States. *Id.* See also P. Vateesatokit, B. Hughes & B. Ritthphakdee, *Thailand: Winning Battles, but the War's Far from Over*, 9 TOBACCO CONTROL 122, 122–27 (2000) (discussing the GATT controversy raised by the United States against Thailand's restrictive tobacco legislation under its health policies); GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200 (Nov. 7, 1999), available at <http://www.worldtradelaw.net/reports/gattpanels/thaicigarettes.pdf> (presenting report of the GATT panel on the United States' request for consultations concerning Thailand's internal taxes on cigarettes); Press Release, World Health Organization, *WHO Commends Thailand's Path Breaking Anti-Tobacco Efforts – Cautions Against Any Let Up* (May 31, 2000), [http://www.searo.who.int/en/Section316/Section503/Section2373\\_12983.htm](http://www.searo.who.int/en/Section316/Section503/Section2373_12983.htm) (commending the health justifications and milestones reached by Thailand's restrictive tobacco legislation despite strong opposition to their health policies). Thailand simultaneously passed two key tobacco control laws—the Tobacco Products Control Act (TPCA) and the Non-Smokers Health Protection Act. P. Vateesatokit et al., *Thailand: Winning Battles, but the War's Far from Over*, 9 TOBACCO CONTROL 122, 123 (2000); Douglas Bettcher & Ira Shapiro, *Tobacco Control in an Era of Trade Liberalization*, 10 TOBACCO CONTROL 65, 65–67 (2001). Thai law requires health warnings on not less than 25% of the package area, prohibition of cigarette sales to children under eighteen years, and prohibition of smoking in closed public buildings. One of the most important aspects of the Act was that it demanded the disclosure of constituents and emission products to the Ministry of Public Health. Thailand is only one of a few countries in the world that has such a law. Cigarette packages were also banned from using descriptors such as “light” and “mild” and required labeling with nine pictorial health warnings on rotation. Between 2007 and 2009, the Thai government enforced certain tobacco

The Article 8 guidelines, on the other hand, show significant promise for obtaining the status of customary international law. Not only are the Article 8 guidelines (and the underlying norm they reflect) the oldest, permitting longer time for state practice to follow, but they also uniquely identify as an aim assisting Parties to fulfill their obligations as to the right to life and the right to the highest attainable standard of health, as embodied in General Comment 14 to the International Covenant on Social, Economic and Cultural Rights, adding comprehensive protection from tobacco smoke as an essential aspect of an obligation already undertaken by many States.<sup>195</sup> As with other guidelines, there is not yet sufficient evidence of state practice to determine whether States are adopting the definitions provided in the Article 8 guidelines, although certain States have adopted legislation consistent with the guidelines.<sup>196</sup> Recently, China, a massive consumer and producer of tobacco products, has stated that it will honor commitments under the FCTC to create smoke-free public places in all indoor public venues and workplaces, as well as in trains, buses, and other modes of transportation.<sup>197</sup> The current trend suggests that Article 8 guidelines—or at least the norm they reflect—may obtain the status of customary international law.

The guidelines for Articles 11 and 13 share the same short life as the Article 5.3 guidelines. With regard to Article 11, the guidelines themselves permit wide variations in the content, form, placement, and process for developing warnings and labels.<sup>198</sup> While some standardized practice may develop with respect to certain aspects of the Article 11 guidelines, it is too soon to identify these measures. Moreover, because the Article 11 guidelines' purpose is to "propose measures" that "can" be used for

---

control strategies such as enacting and amending the law that prohibits the sale of tobacco products to minors, and not allowing the importation of fruity flavored cigarettes, which generally target women. The TPCA enforces a total ban on tobacco advertising, promotion, and sponsorship wherein all forms of advertisement are prohibited, i.e., direct advertising, point-of-sale advertising, product placement in all media, and trademark diversification. All forms of promotion are also banned, e.g., free giveaways, exchanges, rebates, and discounts. P. Vateesatokit et al., *Thailand: Winning Battles, but the War's Far from Over*, 9 TOBACCO CONTROL 122, 125 (2000); C.D. Tori & R. Siripanich, *Prevalence and Connotative Meaning of Cigarette Smoking Among Thai Adolescents and Young Adults*, 77 J. MED. ASSOC. THAI. 378, 378–83 (1994).

<sup>195</sup> *Guidelines for Implementation: Arts. 5.3, 8, 11, 13*, *supra* note 13.

<sup>196</sup> See GLOBAL SMOKE FREE PARTNERSHIP & CAMPAIGN FOR TOBACCO-FREE KIDS, EXAMPLES OF GOOD SMOKE-FREE LEGISLATION 4–5 (2009) (noting the current national and sub-national legislation in force that most closely resembles best practices in legislation), available at [http://www.tobaccofreecenter.org/files/pdfs/en/SF\\_legislation\\_examples\\_en.pdf](http://www.tobaccofreecenter.org/files/pdfs/en/SF_legislation_examples_en.pdf).

<sup>197</sup> *China Insists Will Make Good on Smoking Ban Pledge*, AGENCE FRANCE-PRESSE GLOBAL EDITION, May 11, 2010, <http://www.sinodaily.com/afp/100511081312.ivq07hs3.html>. "About 350 million of China's 1.3 billion people smoke cigarettes, with the nation consuming up to one-third of the tobacco products sold annually worldwide, according to the Chinese Association on Tobacco Control." *Id.*

<sup>198</sup> *Guidelines for Implementation: Art. 11*, *supra* note 148.

compliance,<sup>199</sup> it will be difficult to argue that States develop a practice out of a sense of legal obligation (as opposed to choosing certain equally valid alternatives).

## 2. *Soft Law*

Soft legal agreements are not themselves legally binding, but are created with the expectation that they will be given the force of law through either domestic law or binding international agreements.<sup>200</sup> Soft law relates specifically to guidelines of conduct.<sup>201</sup> In relation to treaties, it means that “soft law is not binding”; “soft law consists of general norms or principles, not rules”; and “soft law is law that is not readily enforceable through binding dispute resolution.”<sup>202</sup> The effect of structuring an obligation as soft is a reduction in the costs to deviating from legal expectations. This resonates because a soft legal obligation only implicates a State’s reputation for compliance indirectly—through the expectation that the non-binding rules will be given some binding effect in another legal instrument.<sup>203</sup>

Soft principles can furnish a conceptual frame of reference for future agreements and facilitate the crystallization process that gives rise to customary law. They also contribute to the larger body of law by establishing informal norms of behavior.<sup>204</sup> By taking the form of soft law, resorting to recommended measures permits governments to address problems collectively, without imposing limits on their ability to act.<sup>205</sup> In

<sup>199</sup> *Id.* para. 1.

<sup>200</sup> Timothy L. Meyer, *Soft Law As Delegation*, 32 FORDHAM INT’L L.J. 888, 890 (2009).

<sup>201</sup> PETER MALANCZUK, AHEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 54–55 (1997).

<sup>202</sup> Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L.Q. 901, 901–02 (1999).

<sup>203</sup> Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 591 (2005); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 495 (1991); Christopher C. Joyner, *Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law*, 19 MICH. J. INT’L L. 401, 401–02 (1998).

<sup>204</sup> See generally B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT’L ORG. 829 (2001) (acknowledging that escape clauses increase flexibility of an international trade agreement by adding discretion for national policymakers); Edward T. Swaine, *Reserving*, 31 YALE J. INT’L L. 307 (2006) (discussing reservations as a way of tailoring treaties as they apply to specific countries); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005) (analyzing unilateral exits from treaties); Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT’L ORG. 289 (2001) (discussing how states can form flexible international agreements).

<sup>205</sup> Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women’s Convention?*, 21 BROOK. J. INT’L L. 679, 702 (1996).



the context of banking, trade, arms control, the environment, and human rights, guidelines permit governments to refine and experiment with new notions or in a non-binding situation,<sup>206</sup> thus providing immediate benefits while laying the structural foundation for negotiating binding requirements at a later time. Soft law agreements are especially beneficial to developing countries, which are relieved of the often high costs of enforcement and implementation that accompany legally binding rules. In this manner, developing countries have the freedom to progressively implement soft international laws.

As soft international law, the FCTC guidelines—that do not, per se, impose mandatory action—provide a similar platform by which to: (1) hold both governments and tobacco industry participants accountable, and (2) crystallize certain measures that may serve as the basis for protocols or customary international law in the future. The guidelines to Article 5.3 explicitly contemplate that the COP may develop a protocol with respect to tobacco industry interference that may be adopted as binding legal rules related to conflicts-of-interest, transparency, and monitoring.<sup>207</sup> The COP will have several years to observe and collect data on Parties' practices related to Article 5.3 and Article 13,<sup>208</sup> so that legally binding rules created through protocols can be effectively negotiated and implemented. Similarly, domestic actors will be able to use the gathering evidence regarding smoke-free environments to pressure governments to adopt expansive definitions of "public places" and "workplaces" that require 100% smoke-free air, as required by the Article 8 guidelines.<sup>209</sup>

The evidence is mounting that the FCTC guidelines are exercising influence consistent with notions of "soft law." In July 2009, the organizers of the Shanghai World Expo 2010 returned approximately \$29 million to the Shanghai Tobacco Corporation based in part on China's ratification of the FCTC and promise to undertake a comprehensive ban of tobacco advertising, promotion, and sponsorship by 2011, consistent with the Article 13 guidelines.<sup>210</sup> In a meeting between the Australian Department of Health and Ageing (Department) and British American Tobacco held on January 22, 2009, the Department issued a public notification of the meeting, stating that

---

<sup>206</sup> See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 226–27 (1995) (detailing regulatory and non-binding regimes administered by the IMO, the OECD, the ITU, and the ICAO).

<sup>207</sup> *Guidelines for Implementation: Arts. 5.3, 8, 11, 13, supra* note 13.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Shanghai Expo Refuses 200 Mln Yuan from Tobacco Group*, GLOBAL TIMES, July 21, 2009, <http://business.globaltimes.cn/industries/2009-07/449305.html>. Organizers of the Expo specifically cited China's signing of the FCTC as the reason for returning the donation. *Id.*

Guiding Principle Number 2 of the guidelines for Article 5.3 states: "Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent."<sup>211</sup> On April 12, 2010, the Bill & Melinda Gates Foundation withdrew a \$5.2 million grant to Canada's International Development Research Centre—a public body created by Parliament in 1970 to promote public health and fight poverty—because its chair had previously sat on the board of Imperial Tobacco Canada.<sup>212</sup> While the Gates Foundation referred only to a "conflict,"<sup>213</sup> the termination of the grant followed significant civil society activity anchoring their objections in the Article 5.3 guidelines.<sup>214</sup>

### 3. *The Bangalore Principles*

The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity, a group of senior judges from eight African and Asian common law countries.<sup>215</sup> This group was formed in 2000 under the auspices of the Global Programme Against Corruption of the UN Office for Drug Control and Crime Prevention in Vienna.<sup>216</sup> The principles were subsequently adopted by a conference of chief justices from the major legal traditions in November 2002. The Bangalore Principles are generally directed at judiciaries, rather than the State, for implementation and enforcement.<sup>217</sup>

---

<sup>211</sup> *Guidelines for Implementation: Arts. 5.3, 8, 11, 13, supra* note 13, at 5.

<sup>212</sup> Press Release, Bill & Melinda Gates Foundation, *Statement Regarding IDRC Tobacco Control Grant*, Apr. 12, 2010, <http://www.gatesfoundation.org/press-releases/Pages/statement-on-idrc-grant-100412.aspx>.

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., CANADIAN NON-SMOKERS' RIGHTS ASSOCIATION & SMOKING AND HEALTH ACTION FOUNDATION, CANADIAN CONVENIENCE STORES ASSOCIATION AND THE NATIONAL COALITION AGAINST CONTRABAND TOBACCO: INDEPENDENT ORGANIZATIONS OR GROUPS FRONTING FOR BIG TOBACCO? 5 (2010), available at [http://www.nsra-adnf.ca/cms/file/pdf/who\\_funds\\_the\\_CCSA\\_and\\_NCACT.pdf](http://www.nsra-adnf.ca/cms/file/pdf/who_funds_the_CCSA_and_NCACT.pdf) (finding CLSA and NCACT allies, according to Article 5.3, of the tobacco industry).

<sup>215</sup> Global Programme Against Corruption Conferences, Vienna, Austria, Apr. 15–16, 2000, *Report of the First Meeting of the Judicial Group on Strengthening Judicial Integrity*, CICP-6 (2000).

<sup>216</sup> *Id.*

<sup>217</sup> See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 648 (2007) (emphasizing centrality of judges as "key mediators between the international and domestic human rights regimes").

According to Michael Kirby, the Bangalore Principles state, in effect:

- (1) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
- (2) Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare now the norms thereby established are part of domestic law;
- (3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty — even one ratified by their own country;
- (4) But if an issue of uncertainty arises (as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and
- (5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which then makes it part of domestic law.

[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.<sup>218</sup>

---

<sup>218</sup> Conference Report, Michael Kirby, Austl. Nat'l Univ. Fac. L., Domestic Implementation of International Human Rights Norms (December 6, 1997), [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_inthrts.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_inthrts.htm). See also U.N. Judicial Group on Strengthening Judicial Integrity, Round Table Meeting of Chief Justices, Vienna, Austria, Nov. 25–26, *The Bangalore Principles of Judicial Conduct* (2002), available at <http://www.>

The key idea behind the Bangalore Principles is that international law might provide guidance to judges in cases concerning issue-areas that span common law jurisdictions.<sup>219</sup> Under the Bangalore Principles, therefore, judges and courts are encouraged to use international laws and norms.<sup>220</sup>

The FCTC guidelines not only support certain principles of international law, e.g., that comprehensive protection from tobacco smoke is a fundamental element of the highest attainable standard of health, but also provide specific definitions that can fill gaps in domestic law. These definitions include, *inter alia*, "second-hand tobacco smoke" or "environmental tobacco smoke," "smoking," "public places," "indoor" or "enclosed," "workplace," and "public transport."<sup>221</sup>

In some jurisdictions, legislatures have explicitly used language from the guidelines in drafting the statutory and regulatory framework. For example, Guatemala incorporated the Article 8 guidelines' definition of "enclosed" when drafting its law prohibiting smoking in enclosed public places.<sup>222</sup> On March 6, 2008, the Uruguayan Parliament passed Law 18.256, which shared in pertinent part this language from the Article 13 guidelines:<sup>223</sup>

Parties should prohibit the use of any term, descriptor, trademark, emblem, marketing image, logo, colour and figurative or any other sign that promotes a tobacco product or tobacco use, whether directly or indirectly, by any means that are false, misleading or deceptive or likely to create an erroneous impression about the characteristics, health effects,

---

[unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (providing the text of the Bangalore Principles).

<sup>219</sup> See Commonwealth Secretariat, *Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms* (Feb. 26, 1988), reprinted in *The Bangalore Principles on the Domestic Application of International Human Rights Norms*, 14 COMMONWEALTH L. BULL. 1196 (1988) ("WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions . . .").

<sup>220</sup> Michael Kirby, *The Impact of International Human Rights Norms—A "Law Undergoing Evolution"*, 22 COMMONWEALTH L. BULL. 1181, 1183–84, 1189–91 (1996).

<sup>221</sup> WHO Guidelines, *supra* note 25, paras. 14–22. See *supra* pp. 142–45 (defining these terms).

<sup>222</sup> Law for the Creation of Tobacco Smoke Free Environments, Decree 74-2008, art. 3 (Guat.).

<sup>223</sup> Conf. of the Parties to the WHO Framework Convention on Tobacco Control, Durban, S. Afr., Nov. 17–22, 2008, *Elaboration of Guidelines for Implementation of Article 13 of the Convention*, U.N. Doc. FCTC/COP/3/9 (Sept. 2, 2008) [hereinafter 2008 WHO Conf. of the Parties], available at [http://apps.who.int/gb/fctc/PDF/cop3/FCTC\\_COP3\\_9-en.pdf](http://apps.who.int/gb/fctc/PDF/cop3/FCTC_COP3_9-en.pdf). While the guidelines were not officially adopted until November, 2008, Uruguay sat on the working group for the guidelines which met at least as early as November 2007. WHO, PREVIOUS WORKING GROUPS (2010), available at <http://www.who.int/fctc/cop/previouswgbeforecop.pdf>.

hazards or emissions of any tobacco product or tobacco products, or about the health effects or hazards of tobacco use.<sup>224</sup>

Where legislatures do not define these terms or where meaning is ambiguous, lawyers and judges in many jurisdictions may assert the legal force of these definitions as well as principles included in the guidelines. As an example of a court using the FCTC to supply terms of local law, the Israeli High Court of Justice awarded compensation to an individual to be paid by a restaurateur for violation under FCTC and illegal exposure to secondhand smoke.<sup>225</sup> “Justice Elyakim Rubinstein allowed the appeal of Irit Shemesh, a pregnant woman exposed to secondhand smoke in a Jerusalem restaurant . . . .”<sup>226</sup> The court ruled that, in addition to criminal enforcement, Israeli law recognized a mechanism of civil enforcement for a citizen “who sues for compensation from those who manage or own a public place but [take no steps against smoking in it].”<sup>227</sup> Justice Rubinstein noted that all countries that ratified the FCTC have agreed that secondhand smoke causes “death, disability and illness,” and these countries “assumed responsibility for the protection of their inhabitants from exposure to [tobacco smoke].”<sup>228</sup> While the specific application in that case was to import an acknowledged causation standard, as opposed to the specific definition of an ambiguous term, the application foresees courts’ use of the guidelines to interpret domestic law.

#### *B. The Wiersema Axes*

Instead of conventional classifications like “treaty,” “custom,” and “soft” law, Wiersema proposes that COP decisions be analyzed with respect to “consent, intent, and effect” to understand a given activity’s legal status.<sup>229</sup> The Vienna Convention on the Law of Treaties—especially Article 31—may take Parties a long way toward compliance, but “unless a tribunal is willing to see COP activity as something more than soft law or more than an

---

<sup>224</sup> 2008 WHO Conf. of the Parties, *supra* note 223, at 11 (citation omitted). “The use is hereby forbidden of terms, descriptive features, trademarks, signs or of any other sort of sign which may directly or indirectly create the false impression that a given tobacco product is less harmful than another.” (Author’s translation.) *Id.*

<sup>225</sup> Judy Siegal-Itzkovich, *Court Acts on Israel’s Poorly Enforced Ban on Workplace Smoking*, 333 BRIT. MED. J. 218, 218 (2006) (citing LCA 9615/05 Shemesh v. Fouata Ltd. 89(2) LR (2006)).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Wiersema, *supra* note 27, at 250.

interpretive device,” Parties will be unable to use COP consensus-based activity to “override an existing treaty obligation.”<sup>230</sup> At the risk of oversimplifying Wiersema’s nuanced contribution, that proposition is tested within the context of the FCTC guidelines to determine whether something more than soft law or Article 31(3)(a) is critical for understanding the relationship between underlying treaty obligations and the FCTC guidelines.

*1. Axis 1: Voting and Level of Consent*

Stated plainly, the number of votes matters for purposes of ascertaining obligations arising from COP-based activity. Unanimity, under this axis, does and must mean more than a simple majority or even a super-majority; indeed, at the point of unanimity, one might argue that the distinction between “consent” and “consensus” disappears.

While the FCTC does provide for the use of a super-majority vote in cases where consensus cannot be reached, all the guidelines so far have been adopted by unanimous consent, or without objection, providing support for the argument that the guidelines have become “a new agreement between the parties or some form of instant or emerging customary international law.”<sup>231</sup>

*2. Axis 2: Level of Authorization by the Treaty*

Under this axis, the key inquiry is the degree to which the underlying treaty grants the COP authority to implement or enforce specific parts of the treaty. For the FCTC, this inquiry would add weight to the unanimously approved guidelines for Articles 8, 11, and 13. The FCTC provides that:

Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.<sup>232</sup>

Yet the FCTC does not specifically authorize the COP to adopt guidelines for Article 5.3. Article 5.4 provides, “The Parties shall cooperate in the formulation of proposed measures, procedures and guidelines for the

---

<sup>230</sup> *Id.* at 278.

<sup>231</sup> *Id.* at 251.

<sup>232</sup> FCTC, *supra* note 11, art. 7.

implementation of the Convention and the protocols to which they are Parties.”<sup>233</sup> However, this provision might be read to only include “guidelines” elsewhere authorized, or it might be interpreted to mean that the COP must adopt guidelines for Articles 8 through 13, but may adopt guidelines for other provisions.

### 3. *Axis 3: Intent*

Subsequently, Wiersema argues that COP activity “varies in the type of language used to address the parties and in who is addressed—the states or subsidiary bodies.”<sup>234</sup> “Resolutions” might differ from a “decision,” and therefore carry more or less legal weight. Within these activities, the internal language will matter—“shall” and “should” will tend to create or expand obligations, while “urge” and “recommend” will tend to be merely advisory. Under this analysis, the FCTC provides little guidance as to the intended weight of the guidelines. Certainly, “guidelines” are the principal implementing mechanism authorized by the treaty text, but there is little evidence as to what binding legal effect those decisions were intended to have. Indeed, as described at the beginning of the Article, the major non-Party constituencies appear to be either uncertain or mistaken as to the legal effect of the guidelines.<sup>235</sup> With respect to the precise language used within COP decisions, it is not clear that ascertaining normative “intent” provides greater clarity than understanding unanimously adopted guidelines to constitute a “subsequent agreement” to the treaty and applying normal principles of interpretation.

### 4. *Axis 4: Effect in Implementation*

Finally, Wiersema asks: “Do the parties implement these COP resolutions and decisions or act as though they are legally binding?”<sup>236</sup> While evidence as to Parties’ compliance with the FCTC guidelines is still emerging, some preliminary conclusions can be drawn. First, the Article 8 guidelines represent the most widespread state practice, as Parties accept—at the very least—that non-smokers should be protected from tobacco smoke in enclosed public places. Second, the Article 11 and Article 13 guidelines alternatively recommend that certain actions be taken with respect to their provisions, but also state others with legally binding force. For example, the Article 11

---

<sup>233</sup> Wiersema, *supra* note 27, at 253.

<sup>234</sup> *Id.*

<sup>235</sup> See *supra* notes 16–19 and accompanying text (describing WHO’s, the tobacco industry’s, and civil society’s perspectives on the guidelines).

<sup>236</sup> Wiersema, *supra* note 27, at 255.

guidelines are clear that "low tar," "light," "ultra-light," or "mild" are among descriptors that should be banned because they may lead to a false impression that one tobacco product is less harmful than another, while merely advising that color be used for graphic warnings.<sup>237</sup> The Article 5.3 guidelines are ambiguous in this respect because they are simultaneously conditioned on the "sovereign right of the Parties" to determine their tobacco control policies, but are guided by the principle that "[t]here is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests."<sup>238</sup> Significantly, the inquiry as to whether Parties "act as though [the guidelines] are legally binding" closely tracks one of the central inquiries for determining customary international law.<sup>239</sup>

### 5. *The Significance of COP Votes*

As applied in the context of the FCTC guidelines, Wiersema's axes generate a conclusion that overlaps to a great extent with the application of Article 31(3)(a). Indeed, Wiersema's primary illustrative vehicle for her thesis is a comparison of American and Dutch authorities interpreting COP decisions affecting two different multilateral environmental agreements. In the former, the U.S. Court of Appeals for the District of Columbia determined that COP decisions on methyl bromide within the Montreal Protocol on Substances that Deplete the Ozone layer did not have the force of law in the U.S. because they had not been adopted by formal adjustment.<sup>240</sup> In the latter, the Netherlands Crown determined that one of its protectorates was obligated to perform Environmental Impact Assessments (EIAs) under the Ramsar Convention, based in significant part on the fact that conducting EIAs was included in resolutions and recommendations by the treaty's COP.<sup>241</sup> However, the Crown's decision was based in significant part on the determination that the decisions of the COP fell within the purview of Article 31(3)(a) of the Vienna Convention and that the resolutions had been adopted unanimously.<sup>242</sup>

The application of Wiersema's axes exposes a relatively unexplored question of treaty interpretation: the extent to which, and under what circumstances, unanimity matters. Churchill and Ulfstein phrase it this way:

---

<sup>237</sup> *Guidelines for Implementation: Art. 11, supra* note 148.

<sup>238</sup> *Guidelines for Implementation: Arts. 5.3, 8, 11, 13, supra* note 13.

<sup>239</sup> Wiersema, *supra* note 27, at 255.

<sup>240</sup> *Id.* at 265-68.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*



Consensus decision taking has replaced straightforward majority voting as a result, in Buzan's pithy phrase, of "the divorce of power from voting majorities";<sup>243</sup> in such a situation, taking decisions by majority voting becomes undesirable because of the risk of alienating powerful minorities that may simply ignore those decisions. In view of the consequent need for "a technique that [would] ensure very broadly based support for decisions in a highly divided system,"<sup>244</sup> consensus decision making developed. While this procedure promotes the taking of decisions that are likely to be universally acceptable, it does have some drawbacks. It is likely to slow down the reaching of decisions and to lead to decisions that represent the lowest common denominator . . . . Consensus decision making also raises the questions of, first, what is meant by consensus, and, second, how long the search for consensus must continue before resort may be had to voting. As regards the first question, consensus is usually taken to mean the absence of formal objection to a proposed decision (which is not necessarily the same as unanimity).<sup>245</sup> As regards the second question, no precise answer can obviously be given.<sup>246</sup>

Certainly, civil society groups have used the unanimity of adoption as part of their persuasive case for ratification or implementation of the FCTC and the guidelines. However, currently there appear to be no cases where a domestic tribunal made a determination that unanimity in the adoption of the FCTC guidelines is relevant.<sup>247</sup>

It should be noted that this Article tests Wiersema's axes in a single case of a related but not perfectly analogous treaty context. While the World Health Assembly drew heavily upon the experience of multilateral

---

<sup>243</sup> Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L L. 324, 325–26 (1981).

<sup>244</sup> *Id.* at 327.

<sup>245</sup> Patrick Széll, *Decision Making Under Multilateral Environmental Agreements*, 26 ENVTL. POL'Y & L. 210, 212 (1996).

<sup>246</sup> Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AMER. J. INT'L L. 623, 642–43 (2000).

<sup>247</sup> Press Release, Corporate Accountability International, *Big Tobacco Attempts to Smuggle Loopholes Into Global Tobacco Treaty: Retifying Countries Criticized for Collaboration with Philip Morris International and British American Tobacco* (July 1, 2009), <http://www.stopcorporateabuse.org/release-big-tobacco-attempts-smuggle-loopholes-global-tobacco-treaty>; Smokefree Partnership, *Protection from Exposure to Tobacco Smoke*, 2 SPOTLIGHT ON FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC) 8 (2008), <http://www.smokefreepartnership.eu/IMG/pdf/ers-SL-01.pdf>.

environmental agreements for the Framework Convention on Tobacco Control in its initial stages, the treaty is different in important respects. Yet it is a suitable example to explore alternatives or supplements to Article 31(3)(a). The fact that the guidelines are unanimously adopted is given greater weight under Wiersema's framework than the Vienna Convention, which is, understandably, less clear on the issue. One can predict under this framework that Article 5.3 would give rise to less rather than more legal obligation than Articles 8, 11, and 13 because the FCTC explicitly gives the COP authority to issue guidelines for Article 8 through 13, but not for Article 5.3. Yet experience shows that the Article 5.3 guidelines have exerted significant influence—in a way that typifies the transition from “soft” law to “hard” law—on the actions of both Parties and non-Parties. Axis 3 and Axis 4, respectively, closely follow the inquiries made under Article 31(3)(a) of the Vienna Convention and customary international law.

#### V. A QUESTION OF GOOD FAITH

Article 31(3)(a) essentially brings the FCTC guidelines within the ambit of “good faith” interpretive mandates. Yet for framework conventions in general and the FCTC in particular, many of the obligations imposed by the treaty are national or domestic in nature, and therefore raise difficult questions at the intersection of sovereignty and the good faith doctrine. The FCTC mentions “good faith” only once, in essence restating Article 18 of the Vienna Convention: “Member States that have signed the Convention indicate that they will strive in good faith to ratify, accept, or approve it, and show political commitment not to undermine the objectives set out in it.”<sup>248</sup>

Even in focused studies of the amorphous doctrine of *pacta sunt servanda* (“agreements must be kept”), the good faith concept is more easily articulated as a “horizontal” principle necessary for the proper functioning of contracts, including treaties.<sup>249</sup> The ordinary meaning of good faith is

---

<sup>248</sup> FCTC, *supra* note 11, at VI. Article 18 of the Vienna Convention requires that all States, whether they are signatories or parties to a treaty, have the obligation that they will not defeat the object and purpose of the treaty. Vienna Convention, *supra* note 5, art. 18.

<sup>249</sup> See ELISABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* (1977) (providing a comprehensive review of the origins, interpretations and effects of the good faith doctrine); JOHN F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* (1991) (emphasizing the role of *pacta sunt servanda* in the context of treaty-making). “*Pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith—is the fundamental principle of the law of treaties.” *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n 187, 211, U.N. Doc. A/CN.4/SER.A/1966/Add.1. Article 26 of the Vienna Convention on the Law of Treaties provides, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention, *supra* note 5, art. 26. The Preamble to the Vienna Convention on the Law of Treaties notes, “[T]he principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.” *Id.* pmbl. Nor does the

“honesty of purpose or sincerity of declaration” or the “expectation of such qualities in others.”<sup>250</sup> The principle—described as the foundation of all laws and a fundamental principle of law—is an accepted norm of customary international law, and includes within it notions of fairness and reasonableness.<sup>251</sup> This principle was used as a general principle of law during the drafting of the Statute of the International Court of Justice.<sup>252</sup> The UN Charter also requires that all States should in good faith fulfill their duties under international law.<sup>253</sup> In addition, customary international law places a duty on every State to fulfill its obligations under international law and international agreements.<sup>254</sup> Similarly, the obligation to fulfill treaty obligations in good faith proscribes a State Party from undertaking any act, which could be interpreted as averting or diverting from the object and purpose of the treaty.<sup>255</sup> The duty of a State Party extends to not only comply by the “letter of the law, but also to abstain from acts which would inevitably affect their liability to perform the treaty.”<sup>256</sup>

With respect to treaty obligations that impose a change in the internal or domestic order, the coherence of the good faith principle diminishes. For example, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides:

---

principle allow for partial application. Thus, the European Community argued to the United States in 1986: “[s]elective adherence to the principle ‘pacta sunt servanda’ erodes the very foundation of the international order.” European Community, Memorandum to the United States Concerning the Financial Situation of the United Nations (Mar. 14, 1986), *reprinted in* 25 I.L.M. 482 (1986).

<sup>250</sup> Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELBOURNE J. INT’L L. 339, 340 (2006) (citation omitted).

<sup>251</sup> O’CONNOR, *supra* note 249, at 2.

<sup>252</sup> See Mitchell, *supra* note 250 n.7 (citing Lord Phillimore, Comments in Permanent Court of Justice: Advisory Committee of Jurists, June 16–July 24, 1920, at 335) (“Good faith was recognised as a general principle of law during the drafting of the Statute of the Permanent Court of International Justice.”).

<sup>253</sup> U.N. Charter art. 2, para. 2.

<sup>254</sup> Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 124, U.N. GAOR, 25th Sess., 1883d Plen. Mtg., U.N. Doc. A/2625 (Oct. 24, 1970). See also R.I.R. Abeyratne, *The United Nations Decade of International Law*, 5 INT’L J. POL., CULTURE & SOC’Y 511 (1992) (discussing the increasing formal and informal acceptance of international law and the role of the U.N. in this process).

<sup>255</sup> See Guy S. Goodwin-Gill, *State Responsibility and the ‘Good Faith’ Obligation in International Law*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 75, 93 (Malgosia Fitzmaurice & Danesh Sarooshi eds., 2004) (noting that avoiding responsibilities of a treaty also results in a lack of good faith separately from direct violations of a treaty).

<sup>256</sup> *Summary Record of the 727th Meeting*, [1964] 1 Y.B. Int’l L. Comm’n 27, 32, U.N. Doc. A/CN.4/SR.727.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>257</sup>

Article 2(1) of the ICESCR provides: "Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>258</sup> Similarly, Article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination provides: "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization . . . ."<sup>259</sup>

There are similar provisions in the CEDAW, the Convention against Torture, and the Convention on the Rights of the Child, among others.<sup>260</sup> Despite the calls from advocates, scholars, and U.N. Committees as to the applicability of the good faith doctrine for treaty provisions that require domestic action, the proposition is mostly used in a tautological and unsatisfactory manner.<sup>261</sup>

<sup>257</sup> International Covenant on Civil and Political Rights art. 2, para. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>258</sup> ICESCR, *supra* note 120, art. 2(1).

<sup>259</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 2(1)(d), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 212.

<sup>260</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 24, Dec. 18, 1979, 1249 U.N.T.S. 14 ("States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); Convention on the Rights of the Child art. 4, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." (emphasis added)).

<sup>261</sup> Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOK. J. INT'L L. 341, 349 (2006); Joshua D. Reader, *The Case Against China: Establishing International Liability for China's Response to the 2002–2003 SARS Epidemic*, 19 COLUM. J. ASIAN L. 519, 561–62 (2006); Gillian White, *The Principle of Good Faith*, in THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW 230, 240 (Vaughan Lowe & Colin Warbrick eds., 1994) ("The obligation to perform treaty commitments in good faith applies equally to situations in which the provision falls to

While some may dispute that there is a distinction in the practical applicability of the good faith doctrine between “horizontal” application between sovereigns and the “vertical” application exclusively within a State, the position can be defended at the theoretical level with at least three arguments. First, treaty provisions dealing with internal processes often provide significant flexibility to States Parties. The ICCPR and CERD provisions above are consistent with this formulation, as is Article 5.3 of the FCTC: “In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”

Second, incorporating international law norms into domestic law requires significant flexibility to harmonize those norms within often-complicated networks of laws and regulations. Curtis Bradley and Jack Goldsmith illustrate this quagmire in the context of the ICCPR:

Can one say for sure that the absence of proportional representation in the United States is consistent with the ICCPR’s “right of self-determination? Is the Supreme Court’s rejection of *Lochner* — style economic rights consistent with the ICCPR’s guarantee of the right “freely [to] pursue their economic . . . development”? Are U.S. campaign finance laws consistent with the international human right to “have access, on general terms of equality, to public service?”<sup>262</sup>

Third, without another sovereign alleging conduct that affects its interests, an equally influential principle of international law—non-interference—conflicts with what might be characterized as conduct violating good faith compliance. Article 27 of the FCTC implicitly acknowledges this reality by providing for settlement of disputes as to interpretation or application only between “two or more Parties.”<sup>263</sup>

To demonstrate the difference between horizontal and vertical applications of good faith, compare two guideline provisions from Article 5.3 and Article 13. Article 5.3 Recommendation 4.8 provides, “Parties

---

be carried out by the State itself . . . and to those in which the provisions are implemented by its nationals.”); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT’L L. & ECON. 49, 63 (1997); Aaron N. Lehl, *China’s Trade Union System Under the International Covenant on Economic, Social and Cultural Rights: Is China in Compliance with Article 8?*, 21 U. HAW. L. REV. 203, 223 (1999); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 461–63 (2000).

<sup>262</sup> Bradley & Goldsmith, *supra* note 261, at 462.

<sup>263</sup> FCTC, *supra* note 11, art. 27.

should not allow any person employed by the tobacco industry or any entity working to further its interests to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy.” The Article 13 guidelines provide:

A comprehensive ban on advertising, promotion and sponsorship originating from a Party’s territory should also ensure that a Party’s nationals—natural persons or legal persons—do not engage in advertising, promotion or sponsorship in the territory of another State, irrespective of whether it is imported back to their State of origin.<sup>264</sup>

Not only are the Article 5.3 guidelines conditioned on the “sovereign right of the Parties to determine and establish their tobacco control policies,”<sup>265</sup> but challenging conduct related to Recommendation 4.8 on the basis of good faith would be difficult. Under U.S. law, for example, the Food and Drug Administration regulates tobacco products.<sup>266</sup> The FDA, in turn, is advised by the Tobacco Products Scientific Advisory Committee (TPSAC), which is tasked with providing advice, information, and recommendations to the Commissioner of the FDA on health and other issues relating to tobacco products.<sup>267</sup> Three non-voting seats on the TPSAC are delegated to tobacco industry representatives.<sup>268</sup> If the U.S. ratified the FCTC, would it then be vulnerable to challenges as to its good faith implementation if it did not remove industry representatives from TPSAC? If so, who would be empowered to bring those challenges? With cross-border advertising, not only is it clear that Parties must respect cross-border advertising provisions and refrain from taking any action that would violate stricter advertising policies in a neighboring State, but the treaty itself also provides a mechanism by which a dispute might be resolved.

Alternately stated, neither Wiersema’s axes nor orthodox application of the Vienna Convention’s interpretive principles appear to resolve the more fundamental weakness of international law-making in the framework treaty context; treaty provisions that affect the domestic order are subject only to an undeveloped theory of “good faith” or to the robustness of domestic institutions. With respect to the latter, the use of international law to shape domestic debates fits the classic conceptions of “soft” law of which the FCTC guidelines must be viewed as a preliminarily successful form.

---

<sup>264</sup> *Guidelines for Implementation: Art. 13, supra* note 159, para. 3(a).

<sup>265</sup> *Guidelines for Implementation: Art. 5.3, supra* note 76, para. 5.

<sup>266</sup> 21 U.S.C. § 387(a) (2009).

<sup>267</sup> *Id.* § 387(q).

<sup>268</sup> *Id.* § 387(q)(b)(1)(b).

## VI. CONCLUSION

While scholars continue to assess the nature of consensus-based decisions of Conferences of the Parties as a source of international law, this Article demonstrates that the prevailing approach—identifying binding obligations imposed by treaty or custom and understanding other aspects as having normative force of varying intensity—provides a relatively sharp and useful method for ascertaining legal obligations. Under traditional canons of treaty interpretation, the guidelines approved by the COP of the FCTC include both advisory and obligatory language. For example, the guidelines impose a mandatory obligation with respect to a State's duty to protect its population from tobacco smoke; the Article 8 guidelines specifically associate the “key elements of legislation necessary to effectively protect people from exposure to tobacco smoke” with the treaty's requirement to provide protection as part of the highest attainable standard of health.<sup>269</sup> In contrast, other guidelines “propose” measures that Parties “can” use to increase the effectiveness of certain aspects of the treaty. Similarly, the Article 5.3 guidelines on protecting public health policy from tobacco industry interference and the Article 13 guidelines on banning tobacco advertising, promotion, and sponsorship supply mostly advisory language. Yet these guidelines also specifically allow for the development of protocols drafted under Article 33 to impose relatively stronger legal regimes for those issue-areas, and have exercised significant influence consistent with notions of “soft” law. The international legal principle of good faith may strengthen certain claims within the guidelines. Given that only a short time has passed since the adoption of the guidelines, there is insufficient evidence to support a case that the guidelines constitute customary international law at this time, although the Article 8 guidelines show early promise. The guidelines finally provide a valuable source for defining and interpreting certain terms and principles required for implementing effective measures to protect populations from the hazards of tobacco consumption.

---

<sup>269</sup> *WHO Guidelines*, *supra* note 25, para. 3.

